No. 941613 APR 3 - 199
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In The

Supreme Court of the United States

October Term, 1994

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, (UE),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRITT OF CERTIORARI

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143 pp

QUESTIONS PRESENTED

I. Where a bargaining unit voted to reject any union representation and the employer's pre-election conduct did not involve any "pervasive" unfair labor practices, what post-election circumstances, such as employee and management turnover, substantial passage of time, and significant administrative delay, require that the National Labor Relations Board remedy any objectionable conduct by use of a rerun election rather than impose a bargaining order on a work force whose majority were not even employed in the voting unit when the first election took place?

II. Whether a two and one-half year administrative delay before counting the ballots in a certification election denies any or all parties due process of law?

PARTIES BELOW

The names of all parties to this proceeding in the Seventh Circuit Court of Appeals appear in the caption of this case. Petitioner ABQC Corporation has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, ABQC Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 4, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 44 F.3d 516 and is reprinted in the appendix hereto, Pet. App. 1a[1], *infra.*

The decision and order of the National Labor Relations Board and the decision of the Administrative Law Judge are reported at 313 N.L.R.B. No. 52, and reprinted in the appendix hereto, Pet. App. 20a, *infra.*

STATEMENT OF JURISDICTION

On April 18, 1991, United Electrical, Radio and Machine Workers of America filed a petition for certification as representative of the employees of ABQC Corporation.[2] Although the union lost the election 34-30, it filed various objections to conduct affecting the results of the election and unfair labor practice charges. The Board originally took jurisdiction over this case pursuant to Sections 2(2), (6), and (7), and 10(a), (b), and (d) of the National Labor Relations Act, 29 U.S.C. §§ 152(2), (6), (7), 160(a), (b), (d). The Administrative Law Judge issued his decision on March 1, 1993, and a three member panel of the National Labor Relations Board issued a decision and order substantially affirming the ALJ on November 26, 1993.

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1. References to the appendix of this Petition will be paginated as "a".

2. "ABQC Corporation" is the official name of the employer. In various filings below it was called "America's Best Quality Coatings Corporation", but that was never its correct name. On occasion in this Petition, the abbreviations "UE" will be used for the United Electrical, Radio and Machine Workers of America, and "NLRB" or the "Board" for the National Labor Relations Board. The abbreviation for the Administrative Law Judge in these proceedings is "ALJ".

Pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), the employer petitioned the United States Court of Appeals for the Seventh Circuit for review of the Board's order on December 23, 1993. On January 28, 1994, the Board filed a cross-application for enforcement of its order, and UE filed its own petition for review on January 26, 1994. ABQC was granted its motion to intervene in the latter on February 22, 1994. The cases were consolidated by order dated February 1, 1994. On January 4, 1995, the court of appeals issued a judgment and opinion in the consolidated cases enforcing the Board's order.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 157:

> Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 158(a):

> It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

29 U. S. C. Sec. 159(a):

> Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employee in such unit. . . .

STATEMENT OF THE CASE

In the summer of 1991 the employees of ABQC Corporation voted 34 to 30 to reject any union representation. (Pet. App., 18a-19a). During the preelection campaign, the union and the employer each campaigned vigorously. The UE used tactics ranging from handbilling to home visits, and the employer held its own employee meetings. (Pet. App., 4a). Whatever the level of discussion about the union and the employer' s preferences, it was not likely the employees were intimidated by the employer because there had been many prior occasions when workers and

supervisors went toe-to-toe, pointing fingers in each other's faces, with no disciplinary action taken as a result. (Tr. 1523-1524, 1528).

Nevertheless, the Board has found that management engaged in conduct which disturbed the laboratory conditions of an ideal election campaign by (1) placing everyone on the payroll of the employment agency which supplied its probationary employees in order to solve a cash flow problem, (2) declining to implement wage increases or other benefits prior to the election, and (3) making comments which some people perceived as threats. (Pet. App., 26a-27a). No one was fired, no one was demoted, and no one was denied a day's pay, but the sort of conduct which did occur has been the basis for ordering rerun elections in other cases. As of the day the employees rejected the UE, these were the only bases for challenging their vote.

If the majority vote in the election had been certified promptly, the employees, the union and the employer all would have known that there was no obligation to bargain, that wage and benefit improvements could be implemented at the employer's discretion, and that employees would still be protected from any possible antiunion retribution by the labor laws. If a rerun election had been ordered, the parties would have known that wages, benefits, and working conditions had to be frozen until a new vote was taken. At least people would know where they stood and the parameters of lawful options and expectations. However, the results were not announced until November 1993, (Pet. App., 33a) so no one knew what their rights and obligations were for almost two and a half years after the election.

Six weeks after the balloting, sabotage to a valve caused the draining of tanks containing toxic acid, which led the employer to lay off the shift on which the damage occurred while the event was being investigated. (Tr. 1412-1413). Employees were

recalled on the basis of need and skill, (Tr. 1416-1417) but the Board has deemed the sequence of those recalls discriminatory because it was not impressed with the danger of the sabotage or the wisdom of the employer's choices about which employees it needed when, the people it thought had committed the sabotage, or the bona fides of a drug testing program which disqualified one of the employees from returning. (Pet. App., 28a). Whatever the value of the NLRB second-guessing a businessman about how to protect his company from further damage and run efficiently in the face of danger from an unidentified saboteur, all these events took place at least six weeks after the majority of the employees had voted to reject the union, and the whole episode is now almost four years ago.

Nevertheless, the Board and the court of appeals ordered the employer to recognize the UE and impose it on ABQC's present employees as their exclusive bargaining representative. (Pet. App., 12a; 30a). In the two and a half years between the election and the Board's order, plus the additional year for the appeal to the Seventh Circuit, there has been so much natural employee turnover that the majority of those working at ABQC today never voted in the election. During the same period, the company has had three different presidents (Pet. App., 41a); neither the person in charge today nor his predecessor were present during any of the conduct in issue. In short, a union which never won an election is being imposed on an employer and employees who not only did not support the union when the people voted, but a majority of whom were not even on the payroll during the time period upon which the Board rests to justify its order.

ABQC had 68 hourly paid employees at the time the UE petitioned for an election. (G.C. Ex. 4(a)); 34 of the 64 eligible voters who cast ballots rejected the union. (Pet. App., 6a). When the hearing was held before the Administrative Law Judge a year later, there were 53 production and maintenance employees, of

whom 35 had been on the eligibility list at the time of the petition. (G.C. Ex. 4(b)). By the date the first appellate brief was submitted, ABQC had 62 hourly employees, of whom only 24 had been active employees on the date of the election.[3] Whatever the original employees' desires, motivations, or understandings, less than 40% of today's work force had any voice in the determination of who, if anyone, would be their exclusive representative for all dealings with their employer. Even if it is assumed, *arguendo*, that every 1991 voter working at ABQC today still supports the union, they do not constitute a majority of the present bargaining unit.

The case comes down to whether the challenged postelection conduct can transform events from what would normally warrant only a rerun into a bargaining order which controls people who never gave the union a majority vote, never worked at the facility when the misconduct occurred, and never had an opportunity to vote on who would represent them. It is the imposition of this extraordinary remedy which is the basis for this petition.

REASONS FOR GRANTING THE WRIT

The basic labor policy of the United States has always been employee self-determination and majority rule. An employer cannot make an individual agreement with an employee who is represented by a union because the union is the employee's exclusive representative, *J.I. Case Co. v. NLRB,* 321 U.S. 332, 337 (1944), but an employer and a union cannot enter into a labor agreement where the majority of the employees it will cover have not endorsed the union. *International Ladies Garment Workers Union v. NLRB, (Bernhard-Altman Texas Corp.),* 366 U.S. 731, 736 (1961). And a minority of employees cannot force the employer to deal with their own group where the majority have

3. The latter two figures were not in the official trial record, but were offered without dispute during the appeal process.

made some other designation of representation. *Emporium-Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 62 (1975). No matter which perspective is used, the majority makes the decision for everyone, and a minority cannot have its own way.

One of the options the majority is entitled to adopt is a rejection of any union. At least since 1947, the statute has provided as much protection for the right to refrain from union activities as the right to participate in them. Even when the union has majority status, the individual's freedom to refrain from union activities entitles him to decline paying any union dues beyond the costs directly associated with whatever contract rights the union has gained for him. *Communication Workers of America v. Beck,* 487 U.S. 735, 762 (1988). "Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. . . ." *Emporium-Capwell,* 420 U.S. at 62. (Justice Marshall, for the majority, denying a minority caucus of African-American employees the right to picket their employer where the union representing the group did not endorse the activity).

The only vote at ABQC was a 34-30 rejection of the UE. Most of the employees who voted in that election have left the company. A majority of the present employees were not even hired at the time of that election. Yet, the Board's order foists a union most did not want on the employer and employees who had no voice in its selection. If an employer and a union cannot, in good faith, impose a union on a work force without a majority vote, how can the Board do so when the majority has specifically rejected the union?

I. BECAUSE A BELATED BARGAINING ORDER IGNORES THE RIGHTS OF PRESENT EMPLOYEES, IT DOES NOT "EFFECTUATE THE POLICIES OF THE ACT."

The National Labor Relations Act empowers the Board to remedy unfair labor practices by requiring the wrong doer to take such action "as will effectuate the policies of this Act." NLRA Section 10(c), 29 U.S.C. § 160 (c). The fundamental policy of the Act is Section 7, which protects collective activity, but which also states that employees "have the right to refrain from any or all of such activities. . ." 29 U.S.C. § 157. Exclusive representative status is founded on the designation of a majority. 29 U.S.C. § 159(a). Forcing the majority of today's ABQC employees to accept the UE as their representative may punish the employer for something it did four years ago, but it does not give basic Section 7 rights and choices to the employees the Act is intended to protect.

Of course, there can be problems identifying the desires of the majority. A quarter of a century ago, this Court held that an employer could be compelled to bargain with a union which did not win an NLRB election if the union could prove (1) it had majority support, (2) it had lost the election because of significant employer misconduct, and (3) a fair rerun election was impossible because of that misconduct's lasting effects. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Since that decision, empirical studies have demonstrated that the bargaining order remedy is not useful for assuring majority rule in such cases, and the Board and the courts of appeals cannot agree on the standards for its usage. This case warrants certiorari because it offers an opportunity to resolve the disputes between the decision makers about the circumstances which justify the invocation of what this Court has deemed an extraordinary remedy.

The viability of a remedy must be assessed against both the reasons for its use and the impact that action will have on the people and events it will control. The goal of the national labor policy is the determination of what representation, or nonrepresentation, a majority of the employees in a bargaining unit want to utilize in dealing with their employer. Majority rule is always the goal and the result to be obtained. A bargaining order which thwarts that goal is a punishment, not a remedy.

Authorization cards normally do not reflect the desires of the majority, for even when unions have obtained those signatures before an election, it is probable that fewer employees will vote for the union than the cards suggest. Whether people sign cards because of peer pressure in public meetings, undue union influence, or lack of all the information which a campaign will elucidate, *e.g., NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), the fact is that most elections show fewer employees voting for the union than had signed its cards. While employees are likely to increase union support in response to, or fear of, preelection employer coercion, they are not likely to give the union a majority on a rerun if the employer's misconduct was relatively minor. Finally, the secret ballot desires of employees are less likely to be prounion than the cards suggest, for statistics show that when less than 62.5% of the unit sign cards[4], an election result favoring the union is unlikely regardless of employer conduct. Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, *Union Representation Elections: Law and Reality,* Russell Sage Foundation, (1976); Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision,* 79 Nw. U. L. Rev. 87 (1984). In short, the basic premise of *Gissel*—that the cards are more reflective of true majority support than a secret ballot election—has no empirical support.

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4. Of 72 eligible voters at ABQC, at most 44, or 61.1%, signed cards. (Pet. App., 41a-43a).

Some courts have noted this data and held that a secret ballot rerun election remains the best determination of majority support in virtually all cases. Others have added that a passage of time between the election and implementation of a bargaining order ignores the majority's wishes because employee turnover may well moot the union's preelection card-based majority. And still others have criticized the Board's failure to explicate why a bargaining order is a better effectuation of employee preference, particularly after time and turnover, than a rerun election which allows present employees to have a role in determining who will represent them. Nevertheless, the Board systematically brushes aside evidence of delay, turnover, and changed circumstances to impose mandatory union representation regardless of the data and the instructions of the courts.

This petition, then, asks for the an explication of standards for proper implementation of the principles voiced in *Gissel.* Should there be some sort of time test, such as favoring a bargaining order issued within six months, but favoring other corrective action such as backpay and notices, followed by a new election thereafter? Should there be a distinction between unfair labor practices committed before and after an election? Can postelection conduct support a bargaining order when the challenged preelection conduct would normally support only a rerun? When do today's employees get to vote on whether their desires are the same as a work force which departed years ago?

In exercising its *Gissel* power, "to issue a bargaining order in spite of the union losing the election, the Board ought to do what a district judge does when issuing an injunction: determine what remedy is necessary as of the time the order issues. . . ." *Montgomery Ward & Co., Inc. v. NLRB,* 904 F.2d 1156, 1162 (7th Cir. 1990) (concurring opinion). A remedy which may have been appropriate four years ago is not necessarily appropriate today, for a vindication of employee wishes affected by conduct then is

not the issue for the majority of today's employees, particularly if they were not even present at that time. The question must be the best decision now, not what might have been a good idea if it had been put into effect half a decade ago.

Without consistent treatment of administrative delay, the courts and the Board have been making decisions about bargaining orders under circumstances which are no longer in existence at the time the remedy is to be implemented. Ever since *Gissel*, the Board has been obligated to give reasons justifying the imposition of a bargaining order. *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 508 (7th Cir. 1980) *citing Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973). Ironically, as noted in *Red Oaks*, even a cursory examination of the decisions applying *Gissel* in the circuits reveals that the Board has repeatedly ignored that mandate and declined to reveal the reasons for its issuance of such bargaining orders. Remands for further explanation has also proved futile. *Id.* at 508-09. The result of all of this has been a denial of both employee and employer rights because both parties are forced to accept a union which may no longer be the choice of the majority of present employees.

II. LACK OF CONSISTENCY AMONG THE COURTS AND THE BOARD HAS RESULTED IN AN INFRINGEMENT OF THE EMPLOYEES' SECTION 7 RIGHTS TO DECIDE UPON UNION REPRESENTATION.

The decisions involving bargaining orders have not dealt consistently with events which occur subsequent to the elections in *Gissel* cases. Often, as here, current employees have a union imposed upon them which was never elected by a majority of the former employees. The national labor policy requires that employees be assured equally the right to organize and the right

to refrain from union representation based on the desires of the majority in an appropriate bargaining unit. At the June 21, 1991 election, the ABQC employees voted 34 to 30 against any union representation. Despite this rejection, and primarily because of events which occurred long after the election, the employer has been ordered to bargain with the union.

To justify this inversion of basic democracy in this case, the Board has exploded some garden variety examples of pre-election exuberance, a legitimate management response to administrative and financial problems unrelated to the union's election campaign, and a post-election reaction to sabotage into "hallmark violations." Then, the Board went on to conclude that a rerun (now four years later) would be an ineffectual manifestation of employee choice, somehow inadequate as compared to a bargaining order which would require the present majority of employees to be represented by a union for which they never had an opportunity to vote.

All the bases for voiding the election have led to no more than a rerun in earlier cases. In *NLRB v. Knogo Corp.*, 727 F.2d 55 (2nd Cir. 1984), the employer committed "pervasive" unfair labor practices during and after an organizing campaign, including coercive interrogations, singling out known union adherents, and blaming the union and the election campaign for its failure to implement economic benefits; nevertheless, the Second Circuit denied enforcement of the Board's bargaining order and ruled a rerun election the more appropriate remedy. *See also, J.J. Newberry Co. v. NLRB,* 645 F.2d 168 (2nd Cir. 1981) (rerun appropriate after unlawful interrogation and wage increases); *NLRB v. Appletree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982) (rerun after unlawful interrogations, discharge, and benefit improvements). ABQC did no worse. Again, ABQC's payroll change, which, the Board held, created employee anxiety over a different name on the payroll account, was hardly as

dramatic as the change from employee to independent contractor status which warranted denial of a bargaining order in favor of a rerun in *NLRB v. Amber Delivery Service,* 651 F.2d 57 (1st Cir. 1981). "In determining whether a bargaining order should be enforced in such cases, the Board should not be allowed to remedy one possible injustice by taking the substantial chance of imposing another." *Conair Corporation v. NLRB*, 721 F.2d 1355, 1383 (D.C. Cir. 1983). The violations committed by ABQC did not rise to the "hallmark" level which would require a bargaining order instead of a rerun election.

In *NLRB v. Vemco, Inc.*, 989 F.2d 1468 (6th Cir. 1993), *modified,* 997 F.2d 1149 (6th Cir. 1993) (reversing, in part, a Board decision upon which the ALJ relied here, Pet. App., 16a-17a), the employer, having openly proclaimed its anti-union philosophy: (1) threatened to close the plant and re-open with new employees; (2) threatened harsher personnel decisions; (3) promised overtime and recall benefits; (4) confiscated union literature; (5) solicited grievances; (6) threatened at least one employee with discharge; and (7) imposed overly broad no-solicitation rules. Despite all this, the court found that "[t]hese undisputed violations do not, however, warrant a bargaining order under either category set forth in *Gissel.*" *Id.* at 1490. During the ABQC preelection period there was no threat of discharge, shutdown, job loss, or harsher treatment. At most, the ABQC election was affected by one episode of union literature being confiscated, a new checking account, a few offhand remarks by supervisors on the floor, and some vague affirmation of benefits "down the road." If *Vemco* did not warrant a bargaining order, neither does this case.

A rerun election is typically ordered where there is proof of misconduct which prevents free choice. Threats and bribes are the classic examples of such misconduct; recent Board decisions suggest misinformation and misrepresentations are not enough

because employees are capable of seeing through such propaganda and making their own decisions. *Montgomery Ward*, 904 F.2d at 1161-63 (concurring opinion). Despite findings that an administrative payroll change or a misconstrued statement about benefit increases was perceived as distressing voters, empirical evidence suggests such action will not substantially affect the 34-30 results of an election. *Id.* Even if the outdated "laboratory conditions" standard is applied, a rerun provides a far more appropriate remedy than a bargaining order which forces the majority of present employees to accept a union they never had an opportunity to consider.

Further eroding rights of today's ABQC employees, the Seventh Circuit has sanctioned a decision which the Board has made without sufficiently explaining what length of administrative delay is too long, there is no explication about the point and conditions at which employee turnover requires a new election. This case simply says three or four years is not long enough, the court merely deferring to the expertise of the Board which has not explained its actions. For some unarticulated reason, four years is acceptable in this case and the employer must now bargain a contract with a union never elected by the employees whose work lives that contract will control.

A. An Election, Not A *Gissel* Bargaining Order, Has Always Been The Preferred Method Of Protecting An Employee's Section 7 Rights.

As long ago as *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), and *International Ladies' Garment Worker's Union v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731 (1961), an election has been the preferred method of remedying violations which impede the employee choice predicate to collective bargaining. A bargaining order is an extreme remedy, reserved only for extreme cases, because it forces employees to accept the

union which never had majority support and jeopardizes their Section 7 right to choose whether or not to organize, 29 U.S.C. § 157. Even when the union had an authorization card majority, the employer's unfair labor practices must be:

> so serious that employees would be intimidated from voting their true preferences *in a new election* even if no unfair labor practices were committed [during the four years here preceding] the campaign leading up to that [new] election and even though the new election (like the old one) would be by secret ballot. We have held these conditions satisfied *only* where the Employer's unfair labor practices were both serious and numerous . . . or . . . pervasive.

NLRB v. The Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983) at 1370-71 (citations omitted, emphasis added). *Accord Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990).

The seminal policy has always been an affirmation of majority rule and a distaste for imposing union representation on a bargaining unit which has not shown a desire for it. *Conair*, 721 F.2d at 1381-84. Where a majority has not designated a union to represent it, a bargaining order is "fraught with danger" for employee freedom of choice. *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 397 (D.C. Cir. 1981), cited with approval in *Conair*, 721 F.2d at 1384. A better approach in such cases, is some "set of extraordinary notice and access provisions" or some similar extension of the usual posted notice, cease and desist orders and a subsequent new election. *Id.* A bargaining order is reserved for unusual cases, "not because courts ought to save employers from the deserts of their illegal behavior but because Section 7 of the NLRA provides that employees' choice of bargaining

representative or no representative is conclusive." *Montgomery Ward,* at 1160-61 (concurring opinion).

"An election, not a bargaining order, remains the . . . preferred method for determining the bargaining agent for employees." *Appletree Chevrolet,* 608 F.2d at 996. Because the election process is the preferred method, the Board may issue a bargaining order only where the prospect of holding a fair election has been diminished to an extreme by the employer's persistent unfair labor practices. *M.P.C. Plating, Inc. v. NLRB,* 912 F.2d 883 (6th Cir. 1990).

In fashioning a remedy, the Board is obligated to consider whether a fair election would be possible. *NLRB v. Creative Food Design Ltd.,* 852 F.2d 1295, 1302 (D.C. Cir. 1988). The Board must determine whether a contemporaneous election would be a more reliable indicator of employees' current desires than the original card showing. *Id.* In making this determination, it is illogical not to consider . . . employee turnover." *Id., citing NLRB v. Jamaica Towing,* 632 F.2d 208, 214-15 (2nd Cir. 1980).

B. The Board And The Courts Are In Disagreement Over Whether The Passage Of Time And Turnover Are Relevant Considerations When Ruling Upon The Validity Of A Bargaining Order.

In issuing a bargaining order, the consideration of employee turnover has long been a point of disagreement between the Board and the courts. *See J.L.M., Inc. v. NLRB,* 31 F.3d 79, 84 (2nd Cir. 1994). Nearly all courts confronted with the issue have concluded that turnover is a significant indicator of whether the effects of an employer's unfair labor practices have dissipated, and to determine whether a fair election could now be possible. *NLRB v. Pace Oldsmobile,* 739 F.2d 108, 112 (2nd Cir. 1984). "The Board may never disregard turnover in deciding whether to

order the employer to bargain with the union in cases where the employer withholds voluntary recognition requested by the union." *Creative Food Design Ltd.*, 852 F.2d at 1302.

The courts have denied the enforcement of bargaining orders based on the passage of time and employee turnover because such an "order in the face of significant employee turnover risks unjustly binding new employees to the choices made by the former ones." *J.L.M., Inc.*, 31 F.3d at 84. "A bargaining order may unjustly bind new employees to the preference of departed ones. Where a remedial order has the primary effect of negating the rights of current employees rather than furthering them, it defeats, rather than effectuates the policies of the N.L.R.A." *Avecor Inc. v. NLRB*, 931 F.2d 924, 936 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 912 (1993); *see also, Creative Food Design Ltd.*, 852 F.2d at 1302-03.

Because a bargaining order must be appropriate at the time it is issued, regardless of circumstances at some earlier date, the Board must consider the passage of time as a mitigating factor weighing against the issuance of such an order. *J.L.M., Inc.* 31 F.3d at 85. (Bargaining order inappropriate where three years between violation and Board order). Since a *Gissel* order may impose on the present employees a union they did not choose to represent them, bargaining orders are appropriate "[o]nly where there is substantial danger that the employees [today] will be inhibited by the employer's conduct from adhering to the union, . . . and only when the Board demonstrates that an election is unlikely to reflect the uncoerced preference of the [present] bargaining unit." *NLRB v. Gordon*, 792 F.2d 29, 33 (2nd Cir. 1986) (citations omitted). With the passage of time, the coercive effects of an unfair labor practice may have dissipated, employee turnover may result in a work force with no interest in the union, and a fair election might be held which accurately reflects the will of the present employees. *Peoples Gas Systems, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980).

In the case of ABQC, there was not a "substantial danger" that the employees would be inhibited by the employer's conduct, especially given that even the post-election violations are now long past. Coupled with the passage of time and natural employee turnover, this indicated that a prompt rerun election would have better served the interests of the ABQC employees. This is not what happened here however. ABQC and its current employees now find themselves subjected to four year old authorization cards, never ratified by secret ballot, with no explanation why that is preferable to an election now.

The Board has declined to consider the passage of time and employee turnover, arguing that such factors are not relevant because "*Gissel* contemplates that the propriety of the bargaining order would be 'appraised as of the time of the commission of the unfair labor practices, and not currently.' " *Gibson Products Co.*, 185 N.L.R.B. 362, 363 (1970). The Board claims that employer recalcitrance should not be rewarded, and that the court does not mean to suggest that a lengthy delay should result automatically in an election rather than a bargaining order. *NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991), *citing Texas Petrochemicals v. NLRB*, 923 F.2d 398, 404 (5th Cir. 1991). There seems to be two NLRB models of an employee: "one that it uses when deciding when to accept the results of an election, and another that it uses when deciding whether a new election would give effect to the employees' preferences. It has never explained this disparity, despite being criticized for it." *Montgomery Ward*, 904 F.2d at 1162 (concurring opinion) (citations omitted).

On the other hand, most of the courts which have considered the issue have repeatedly pronounced that turnover is a "relevant consideration militating against the issuance of a bargaining order." *J.L.M. Inc.*, 31 F.3d at 84; *NLRB v. Cell Agriculture Mfg. Co.*, 41 F.3d 389, 398 (8th Cir. 1994); *see also, NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991)

(inordinate delay attributable to the Board cannot be ignored in developing a remedy which protects employee rights); *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123 (4th Cir. 1992) (significant employee turnover through normal attrition may make bargaining order inappropriate); *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982) (high employee turnover rate one factor militating against issuance of bargaining order); *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d at 405-406 (5th Cir. 1991) (passage of time relevant); *DTR Industries, Inc., v. NLRB*, 39 F.3d 106 (6th Cir. 1994) (changed circumstances can be determinative in evaluating whether Board has justifiably rejected preferred election remedy in favor of bargaining order; five years and dramatic changes in size and composition of workforce sufficient to deny enforcement of bargaining order); *M.P.C. Plating*, 912 F.2d at 888 (6th Cir. 1990) (passage of time and employee turnover relevant); *Impact Industries v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988) (passage of seven years, employee turnover, and change of management all relevant factors); *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389, 398 (8th Cir. 1994) (Board must consider any changes of circumstances, including passage of time and employee turnover); *Piggly Wiggly v. NLRB*, 705 F.2d 1537, 1543 n.9 (11th Cir. 1983) (changes up to the time of hearing are relevant factors). The majority view within the circuits is clearly that "events subsequent to the employer's violation, such as the passage of time and substantial turnover of employees, are relevant and important factors that should be considered." *Pace Oldsmobile*, 739 F.2d at 111, *citing NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 231 (2nd Cir. 1983).

Despite such pronouncements, consideration of turnover continues to be absent not only from analysis undertaken by the Board, but also by some courts in these types of cases. In *NLRB v. Bakers of Paris*, 929 F.2d 1427 (9th Cir. 1991), the court declined to consider the passage of time or employee turnover as relevant factors. We "will not remand a case solely to have the Board

consider further the appropriateness of the bargaining order in light of the passage of time and employee turnover . . . such changes have been held irrelevant to the adjudication of enforcement proceedings." *Id.* at 1448. The court rationalized that this policy will deter employers' delay tactics, since employers are prevented "from intentionally prolonging Board proceedings in order to frustrate the issuance of bargaining orders." *Id., see also, Seattle-First Nat. Bank v. NLRB,* 892 F.2d 792, 795 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990); *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1352-53 (9th Cir. 1980).

In the case at bar, the Board stated that "evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order." (Pet. App., 29a). This constituted clear error because the passage of time during the pendency of this case has resulted in a natural turnover of employees who left regardless of the alleged unfair labor practices and new hires who have never been allowed to vote for or against the UE.

C. Cases Within Three Circuits Are Inconsistent Over Whether The Passage Of Time And Employee Turnover Are Relevant Considerations To The Validity Of A Bargaining Order.

Not only have the courts of appeals reached divergent conclusions as to whether post election events, including turnover, should be relevant in determining whether a bargaining order is appropriate, but cases within each of these circuits are also inconsistent. Within the District of Columbia Circuit, for example, the confusion is apparent: "The circuit courts have reached divergent conclusions as to whether post-election events, including turnover, should be taken into consideration in determining the need for a bargaining order. Indeed, our own

cases have not been wholly consistent." *Avecor*, 931 F.2d at 936. *See Peoples Gas Systems*, 629 F.2d at 45, n.18, 47-48; Note, *After All, Tomorrow Is Another Day: Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 Stan. L. Rev. 505, 512-21 (1979) (citing cases).

When first confronted with the issue, the District of Columbia Circuit concluded that the Board must always consider conditions existing at the time the bargaining order is issued. *Peoples Gas Systems*, 629 F.2d at 47-48; *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1012 (D.C. Cir. 1981). But then the court stated that "we have never, however, imposed a blanket requirement on the Board that it consider subsequent events before issuing a bargaining order and we refuse to do so today." For "holding a rerun election simply because of the passage of time rewards employer recalcitrance. . ." *St. Francis Fed. of Nurse & Hlth. Pro. v. NLRB*, 729 F.2d 844, 856 (D.C. Cir. 1984). The inconsistency was compounded when the court stated that turnover occurring between an unlawful repudiation of the union and the Board's remedial order need not be taken into account. The court treated the lapse of time as analogous to turnover which occurs between recognition and an unlawful withdrawal, and as such, it had no legal significance. *Creative Food Design Ltd.*, 852 F.2d at 1301-03. Nevertheless the court stated that the Board must always consider turnover before issuing a *Gissel* bargaining order, even though majority support is assumed despite a change in the workforce, and that turnover in and of itself can never defeat a bargaining order. *Id.*

To confuse the inquiry even further, the court distinguished between category I bargaining orders, *i.e.*, "extreme, pervasive and [cases revealing the] entrenched character of employer's misconduct," and category II *Gissel* orders which are described as "less extraordinary." *Avecor*, 931 F.2d at 936-37. Before issuing a category II bargaining order, the Board would be

required to carefully consider employee turnover, but when dealing with category I bargaining orders, the Board need make only minimal findings that the effects of misconduct have not been dissipated by subsequent employee turnover. *Id.* Thus, the District of Columbia Circuit appears to hold that the Board need not consider turnover where it finds that the employers' practices were particularly flagrant or pervasive, but, it gives no guidelines as to what constitutes flagrant or pervasive practices. *See id.; Amazing Stores, Inc. v. NLRB,* 887 F.2d 328 (D.C. Cir. 1989).

The District of Columbia Circuit is not alone in its confusion on the issue. The Second Circuit has stated that the passage of time and turnover of employees are clearly relevant factors which the Board must consider. *See J.L.M., Inc.,* 31 F.3d at 84-85. However, this same circuit has been wholly inconsistent as to the length of delay and amount of employee turnover warranting denial of the enforcement of a bargaining order. *Id.* (three year delay coupled with high employee turnover rate (41% or 57%) sufficient to deny enforcement of bargaining order); *NLRB v. Long Island College Hosp.,* 20 F.3d 76 (2nd Cir. 1994) (15 year delay was too long to be tolerated); *but see, NLRB v. Star Color Plate Service,* 843 F.2d 1507, 1508-09 (2nd Cir. 1988) (enforcing bargaining order after five year delay), *cert. denied,* 488 U.S. 828 (1988); *Glomac Plastics, Inc. v. NLRB,* 592 F.2d 94, 102 (2nd Cir. 1979) (enforcing bargaining order after six year delay); *NLRB v. Gordon,* 792 F.2d 29 (2nd Cir. 1986) (100% turnover was not a mitigating factor because turnover was caused by the unfair labor practices sought to be remedied). When considering the subsequent factors of employee turnover, the passage of time and delay, the circuits have been neither consistent among themselves nor definitive within their own jurisdictions.

The Seventh Circuit has also contributed to this confusion. It held in *NLRB v. Berger Storage & Transfer Co.,* 678 F.2d 679, 694 (7th Cir. 1982), that in the absence of "an express articulated

consideration of the propriety of a bargaining order this court will presume that an election is the preferred means for determining representative status." Despite this claim, it has not always been consistent in its articulation of the factors relevant to its endorsement to a *Gissel* order. In *Justak Brothers and Company, Inc. v. NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981), the court stated that "to allow employee turnover to defeat the issuance of a bargaining orderr . . . would undermine employee free choice. Employee turnover should not be a controlling factor." *Id.* The court did not want an employer who engaged in a scheme of unfair labor practices to escape a bargaining order by waiting for employee turnover.

However, in *Impact Industries,* 847 F.2d at 383, the same court was "at a loss" as to why the Board refused to consider evidence of substantial changes, including an 87% turnover in employees, a change in management, and over 7 years between the first election and the final decision of the Board. The court found that this passage of time, coupled with the change in circumstances at the facility, "would seemingly present a strong case in support of [the employer's] argument that a second representation election should be conducted to permit the new work force at [the employer] to determine whether it wants to bargain with the [union]." *Id. See also, NLRB v. Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992) (union found not entitled to the shortcut which a bargaining order might provide, after a 7 year delay, because the Board had not given reasons why the passage of time had not destroyed the order's utility); *Montgomery Ward,* 904 F.2d at 1160 (remand for the Board to consider, in detail, whether, in light of the passage of time and change in circumstances, could adequately ensure fair election, particularly where evidence suggested other, more traditional remedies might effectively rectify past employer conduct); *Red Oaks Nursing Home*, 633 F.2d at 510 (although *Peerless,* 484 F.2d at 1121, indicated that while not a decisive consideration, turnover nevertheless militates against bargaining order in close cases).

Even assuming that the Seventh Circuit cases could be distinguished by different lengths of time, percentages of turnover or whether the turnover was pre or post-order, as in two other circuits, it still has not adequately defined the percentage of turnover which is significant and the length of administrative delay which is unreasonable. Without a determination here, the parties, the courts and the Board will be forced to continue acting without a clear view of which, when, how, and why events subsequent to the election will become significant.

This lack of guidance has resulted in a bargaining order being enforced in this case despite facts which suggest it should have been denied, at least according to most of the cases in the circuits. It is time for this court to delineate clearly, for all the parties involved, when employee turnover, passage of time, and delay will become significant and thus warrant a rerun election instead of a bargaining order. The parties should no longer be subject to bargaining orders which violate both Section 7 and due process rights, issued as a matter of course by the Board and then given inconsistent review by the courts.

II. THE BOARD'S DELAY IN PROCESSING THIS CASE NOT ONLY CREATED THE NEED FOR A RERUN ELECTION INSTEAD OF A BARGAINING ORDER, BUT DENIED ALL THE PARTIES DUE PROCESS OF LAW.

It is now almost four years since the UE petitioned for an election. The Seventh Circuit has already held that a substantial delay in election cases militates against a bargaining order remedy because the passage of time and the concomitant employee turnover which is typical in such circumstances forces today's employees to accept a union which their predecessors never elected in the first place, therefore violating the present group's Section 7 right to decline representation. *Peerless*, 484

F.2d at 1117, n.13; *Red Oaks Nursing Home,* 633 F.2d at 509. When the Board's processes have been the cause for the delay, a bargaining order is not a favored remedy. *Montgomery Ward,* 904 F.2d at 1160, n.4. "Where a remedial order has the primary effect of negating the rights of current employees rather than furthering them, it defeats, rather than effectuates, the policies of the N.L.R.A." *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 443 (D.C. Cir. 1972), *quoted in Avecor,* 931 F.2d at 936.

Over and above this serious question of the relationship between delay, employee turnover, and the Section 7 rights of current employees, the Board's tardiness has, in a very real way, created a form of entrapment for the parties. A prompt resolution of the challenged ballots could have determined the true results of the election more than three and one-half years ago. By consolidating the administrative determination of voter eligibility with the hearing of the unfair labor practice complaint case a year after the election, the Board's procedures forced the employer to gamble not only on whether the union would be certified, but also whether it could give a raise or institute a rule any time in the four years since all this started.

The institutional delay of the investigative process created problems for the union as well: Could it insist on bargaining? Could it represent employees in a grievance system? Did it have to stand by, looking helpless and ineffective in the face of what it considered inappropriate employer behavior? Was it doing its members a disservice by encouraging them to be aggressive, or to be patient? How could it hold together any kind of strength for bargaining a contract if it had to wait years for the right to negotiate? Did this Board delay so frustrate the employees that they felt only the desperate act of property damage could gain them any impact?

Blithely dismissing such issues with an acknowledgement of

"the ordinary institutional time lapses inherent in the legal process" (Pet. App., 14a) does not justify or excuse the Board's deficiencies. In equal employment cases, "an inordinate delay in filing suit" which prejudices the defendant can be a basis for dismissal. *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978), relying on *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977). Delays and their concomitant inhibitions on positions at trial have been held valid defenses in *EEOC v. Westinghouse Electric Corp.*, 592 F.2d 484, 486 (8th Cir.) (3 1/2 year delay); *EEOC v. American Petrofina Company of Texas*, 17 Emp. Prac. Dec. § 8555 (E.D. Tex. 1977) (5 year delay after initial charge); *Lacy v. Chrysler Corp.*, 533 F.2d 353, 361, n. 8 (8th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976) (delays ranging from ten months to 2 1/2 years).

In *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 490 (3rd Cir. 1980), the court found that an administrative review process of a single disability application which extended to nearly four years was wholly inexcusable. This Court has recognized that the time length of a wrongful deprivation of benefits is an important factor to be considered in assessing the impact of government action on private interests. *Id.* at 490, *citing Fusari v. Steinberg*, 419 U.S. 379, 389 (1975). At least one court has held that due process was violated because the administrative determination of eligibility for benefits took too long (delay of just over 100 days); *Steinberg v. Fusari*, 364 F. Supp. 922, 937-38 (D. Conn. 1973), *vacated and remanded on other grounds*, 419 U.S. 379 (1975). The court in *Kelly* stated that "[a]lthough there is no magic length of time after which due process requirements are violated, we are certain that three years, nine months, is well past any reasonable time limit, when no valid reason for the delay is given. *Kelly*, 625 F.2d at 490.

In *Parker v. Railroad Retirement Bd.*, 441 F.2d 460, 464 (7th Cir. 1971), the agency took six years to determine that an annuity

applicant was not disabled. The Seventh Circuit, finding that the decision was not supported by substantial evidence, reversed and refused to remand to the agency because of the undue length of time it took that agency to process the disability application initially. The court stated that "the Board must render its determinations with much more dispatch than has yet been exercised in order to meet minimum due process requirements." *Kelly* at 491, at 464.

Here, both parties have suffered as a result of the Board's "normal" delay. Employers cannot function if all personnel decisions must await the Board. This agency was created for prompt dispute resolution, e.g., a six month statute of limitations for an unfair labor practice, 29 U.S.C. § 160(b), and a seven day period for filing objections to conduct affecting the results of an election, 29 C.F.R. § 102.09. Six weeks after the election, when acid tanks were sabotaged and a week later, when wage and benefit improvements were announced, no one even knew the final ballot count. Three months after the election, when an employee handbook was distributed, the final ballot count was still unknown. Five months after the election, when Nixon was fired; eight months after the election, when Proffitt and Mills were fired; and a year after the election, when the Board finally held the unfair labor practice hearing, no one knew that the employees had voted to reject the union.

Would people have acted differently if they knew 34 of the 64 voters had rejected the Union? Would the Union have encouraged the July confrontation using meaningless "grievance" forms? Would disgruntled employees have sabotaged the acid vats? Would ABQC have implemented a handbook without consulting the union? Would the employer have settled the back pay claims of Proffitt, Mills and Nixon two years after the sabotage? No one knows how the parties would have acted with better information.

Several courts have expressed concern about ordering a rerun instead of bargaining despite employee turnover and the passage of time if that action would give the employer an unintended reward for its own wrong doing. *NLRB v. Laverdiere's Enterprises*, 922 F.2d 1095 (1st Cir. 1991); *Texas Petrochemicals v. NLRB*, 923 F.2d 404; *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 440 (7th Cir. 1993). The Board should not be allowed to use its own administrative inadequacies to create the same dynamics favoring a bargaining order as would obtain if the employer had used obstructive delaying tactics to capitalize on its own misconduct. ABQC did not file frivolous charges or objections to the UE election conduct. ABQC did not schedule the ALJ hearing a year after the election or refuse to open and count the challenged ballots until two and one-half years after the election. Yet these Board delays have become the basis for disregarding the preferences of today's employees as surely as if the employer had caused them.

Everyone knows the Board took too long to resolve these issues. Right or wrong, the decision on the challenged ballots at least could have allowed the parties to make informed choices. Delays of three and four years on basic administrative procedures cheat everyone. When the agency's response is a cavalier equation of this case to all the others it has been too slow in deciding, everyone has been denied due process.

CONCLUSION

It is time for this Court to end the confusion created by the Board and the courts and to explicitly define the circumstances under which employee turnover, passage of time, and administrative delay will be considered relevant to issuance of a bargaining order. By resolving this confusion, the due process rights of all parties will be protected and the goals of the collective bargaining process will be moved forward. Any

decision which nullifies employee exercise of free choice is "fraught with danger", *Conair Corporation v. NLRB,* 721 F.2d 1355, 1384 (D.C. Cir. 1983). Even in the face of widespread objectionable conduct, the courts have rejected a bargaining order in favor of a rerun. *NLRB v. Vemco, Inc.,* 989 F.2d 1468 (6th Cir. 1993), *modified,* 997 F.2d 1149 (6th Cir. 1993); Where a substantial delay in the agency's processes is concomitant with major turnover in management and employee complements, denial of a bargaining order is even more imperative.

For the reasons set forth above, ABQC requests that this Court grant the Petition for Certiorari and clarify when events which occur subsequent to the initial issuance of a bargaining order warrant a rerun election instead of the extraordinary and extreme remedy of a court enforced bargaining order, and the point at which administrative delay before issuance of a bargaining order denies all parties due process of law.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED JANUARY 4, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 93-4039, 94-1173, and 94-1198

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner,

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, (UE)

Intervenor-Petitioner.

On Petition for Review and Cross Application
for Enforcement of an Order of
The National Labor Relations Board
20-CA-11425, 30-CA-11580, 30-CA-11712,
30-CA-11822, 30-RC-5250

ARGUED OCTOBER 4, 1994—DECIDED JANUARY 4, 1995

Appendix A

Before CUDAHY and FLAUM, *Circuit Judges,* and ROSZKOWSKI, *District Judge.**

FLAUM, *Circuit Judge.* In this appeal, we consider a petition to set aside and a cross-petition to enforce an order of the National Labor Relations Board ("NLRB" or "Board"), which found that the petitioner employer, America's Best Quality Corporation ("ABQC" or the "company"), violated §§ 8(a)(1),(3), and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1),(3),(5). The Board also concluded that Staff Right, Inc. ("Staff Right"), ABQC's employment and hiring agency, was a joint employer with ABQC, but was not jointly liable for these unfair labor practices. As a remedy, the Board's order required ABQC to cease and desist from any further unfair labor practices, and to reinstate terminated employees with lost wages and benefits. Furthermore, the order required ABQC to recognize the United Electrical Radio and Machine Workers of America Union (the "union"), and, on request, bargain with the Union as the exclusive collective bargaining representative of the employees. On appeal, ABQC challenges the appropriateness of the bargaining order and the Union challenges the Board's conclusion of no liability for Staff Right. We enforce the Board's decision and order.

I.

ABQC is a closely held metal plating corporation located in Milwaukee, Wisconsin. ABQC began operations in June, 1990, after purchasing the corporate entity from the then union-organized Allen Bradley Company. Gene Plonka was ABQC's first President. During the first several months of employment,

* The Honorable Stanley J. Roszkowski of the United States District Court for the Northern District of Illinois sitting by designation.

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ABQC employees were promised both pay raises and additional vacation time, each effective one year after the employment began. In October, 1990, Robert Peterson succeeded Plonka as ABQC's President.

By March, 1991, ABQC employees had become concerned about the status of their promised raises and vacation time. Employees Michael Proffitt, Keith Mills, Lisa Nixon, Robert Person, Virginia Boyde, Sonny Anderson, and Curtis Celske circulated a union organizing petition and contacted union organizer Beth Levie. Thirty three employees signed this petition. In early April, the employees showed the petition to company supervisors Jane Lewandowski and Keith Stanosz, and demanded to be recognized as a group or union.

On April 12, Levie obtained 20 signed union authorization cards. By April 18, the union had 34 cards from ABQC's 64 employees. The Union formed an employee organizing committee. On April 18, this committee, along with union organizers Bob Clark and Levie, went to ABQC's offices and demanded voluntary recognition of the Union. After the company rejected this request, the Union filed a representation petition with the Board's regional office.

The following day, ABQC President Peterson announced that for an indefinite period, employees would be transferred from ABQC's payroll to Staff Right's payroll. Staff Right is a temporary employment agency that provides skilled and unskilled workers in the Milwaukee area which ABQC utilized to fill its employment needs. He stated that this "float" was the result of "cash flow" problems. This announcement scared the employees, who now believed that they were only "temporary" employees with less job security than before the transfer. On

April 25, a group of 20-30 employees once again demanded union recognition by Peterson. He again refused. Both the Union and the company engaged in a variety of campaign activities in the weeks prior to the agreed upon election. ABQC's "game plan" opposing the union organizing effort included weekly meetings, mandatory speeches and questioning of employees. The union campaign included telephone calls and personal visits to employees as well as the distribution of literature.

ABQC engaged in several other campaign tactics to thwart unionization efforts. In a break from its usual practice, the company hired eight new employees just prior to the May 11 election eligibility cut off date. In the days leading up to the election, company officials questioned employees about their union views and threatened that they would enforce stricter working conditions if the employees voted for union representation. Peterson also required an employee to remove a pro-union leaflet, while not requiring the removal of anti-union signs. On June 17, at a mandatory employee meeting, Peterson informed the employees that he could not give any raises or change vacation schedules, despite the elimination of the cash flow problem, because of the pending election. On June 21, the union representation election was held pursuant to an election agreement. 68 of the 72 eligible voters cast ballots: 30 for the Union, 29 against, and 9 ballots which the Union challenged.

On July 15, the company gave employees (and union organizing committee members) Proffitt, Mills, and Hicks warnings for poor attendance. On July 17, the three employees presented Peterson with a grievance, which he refused to accept because he did not formally recognize the Union. On the next day, 30 employees approached Peterson and demanded the raises and vacation time they had previously been promised. Peterson

refused to act until the NLRB ruled on the pending union election challenges and objections.

On that same day, several storage tanks were sabotaged by acid from the metal plating machines, thus requiring the shut-down of those production units. With the machines no longer functioning, Peterson released the First Shift employees for the rest of the day. The following morning, the company refused to allow those employees to enter the plant and informed the employees that they were laid off until further notice. On July 22, the released employees began picketing the plant to protest their layoffs. On July 27, the company began to reinstate some of the First Shift employees, as the production needs required. Furthermore, the company notified its employees that it had decided to grant eligible employees the requested vacation time and merit wage reviews.

Although the company began recalling the laid off employees in late July, it did not do so based on seniority, experience or machine qualifications. Rather, the company recalled less senior employees ahead of the members of the union organizing committee. In fact, it did not recall any of the committee members until late October. In August, Peterson and company attorneys met separately on several occasions with Mills and Proffitt to discuss their involvement in the acid incident. Despite their denials, the company confronted both employees with evidence that they had sabotaged the plant. On February 24,1992, after further investigation, the company discharged Mills and Proffitt.

Towards the end of October, ABQC decided to recall Nixon. A week after giving her a required drug test, the company notified Nixon that the test had been positive and that she no longer could

work for the company. Despite Nixon's denial of any drug use, and her insistence on receiving a copy of the written drug report, the company refused to reconsider her discharge or provide her with the report.

In early September, 1991, the company also unilaterally issued its first employee handbook, making changes in the terms and conditions of employment, including wage structure, work hours, and policies regarding sexual harassment, drugs and alcohol, report pay, call-in pay, outside employment, solicitation, progressive discipline, paid time off, holidays and seniority. In late March, 1992, ABQC also unilaterally created formal job classifications, each with its own pay structure and wage range. ABQC modified the wage ranges for all job classifications in June, 1992.

On March 25, 1992, the Union filed unfair labor practice charges against ABQC. On June 15-18, 1992, and August 10-13, 1992, hearings were held on these charges. On March 1,1993, the Administrative Law Judge ("ALJ") made detailed findings of fact and conclusions of law regarding these charges. The ALJ found that ABQC had violated §§ 8(a)(1),(3), and (5) of the Act, and ordered ABQC to cease and desist from further misconduct. The ALJ also ordered the reinstatement of discharged employees and issued a bargaining order. On November 26, 1993, on review, the Board affirmed most of the ALJ's findings and concluded that ABQC had violated §§ 8(a)(1),(3),(5) of the Act. The Board also found that 5 of the 9 election ballots challenged by the Union should be overruled, resulting in a 34 to 30 vote against the Union. Finally, the Board imposed a cease and desist order as well as a bargaining order to remedy these unfair labor practices. This enforcement action followed.

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II.

ABQC does not appeal the unfair labor practice findings, but rather only challenges the Board's bargaining order as an improper remedy. ABQC argues that because it did not prevent a fair election, a bargaining order is neither necessary nor appropriate. ABQC, despite the findings and conclusions of the ALJ and the Board, contends that neither its pre-election conduct, nor its post-election conduct, nor a combination of the two prevented a fair election at the time or prevents fair elections in the future.

We have jurisdiction to consider the parties' petitions pursuant to 29 U.S.C. § 160(e) and (f). *Electromation, Inc. v. NLRB and Teamsters,* Nos. 92-4129 and 93-1169, slip op. 11 (7th Cir. Sept. 15, 1994); *Central Transport Inc. v. NLRB*, 997 F.2d 1180, 1184 (7th Cir. 1993). We give substantial deference to the Board's conclusions and must uphold the Board's determinations if its factual findings are supported by substantial evidence. "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole should be conclusive." 29 U.S.C. §160(e); *see Ron Tirapelli Ford, Inc. v. NLRB,* 987 F.2d 433, 437 (7th Cir. 1993); *Roadmaster Corp. v. NLRB,* 874 F.2d 448, 452 (7th Cir. 1989) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951)). We also will uphold the Board's legal conclusions if they have a reasonable basis in the law. *Electromation,* slip op. at 11; *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir. 1992); *Local 1384, United Auto., Aerospace and Agric. Implement Workers of America, UAW v. NLRB,* 756 F.2d 482, 492 (7th Cir. 1985). This deferential standard of review is consistent with Congressional intent to confer upon the Board the authority to develop national labor policy. *See International Ass'n of*

Bridge, Structural, and Ornamental Ironworkers, AFL-CIO, Local No. 111 v. NLRB, 946 F.2d 1264, 1267 (7th Cir. 1991) ("[o]ur standard of review is deferential in recognition of Congress' delegation to the NLRB of primary responsibility for national labor policy").

We have repeatedly recognized the Board's power, responsibility and broad discretion "to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Ron Tirapelli Ford*, 987 F.2d at 433 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984)). Although we acknowledge that a bargaining order is "strong medicine and is to be implemented with the utmost care," *NLRB v. Q-1 Motor Exp., Inc.* 25 F.3d 473, 481 (7th Cir. 1994) (citations omitted), we will not substitute our judgment for that of the Board and will not interfere with the Board's choice of remedies absent an abuse of discretion. *Ron Tirapelli Ford*, 987 F.2d at 437. "The determination of the appropriateness of a bargaining order is, like all remedies, entrusted to the sound discretion of the Board." *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1081 (7th Cir. 1981). In fact, we will not disturb the Board's remedial order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Shelby Memorial Hosp. Ass'n.*, 1 F.3d 550, 555 (7th Cir. 1993) (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

In the instant case, the Board, in adopting most of the findings and conclusions of the ALJ, found violations of §§ 8(a)(1),(3), and (5) of the Act. The Board concluded that ABQC violated § 8(a)(1) by coercively interrogating and threatening employees and by telling employees that they had been transferred to the payroll of Staff Right in order to scare

them from supporting the Union. The Board also concluded that ABQC had violated §§ 8(a)(1) and (3) by laying off all bargaining unit employees, by discriminatorily delaying the recall of certain employees after the layoff because of their union sympathies or activities, and by suspending and terminating Mills, Proffitt and Nixon because of their union activities. The Board found additional §§ 8(a)(1) and (3) violations from ABQC's actions in delaying and then granting employment benefits before, during and after the union campaign as well as making unilateral changes in terms and conditions of employment. The Board determined that the company violated §§ 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union after the Union demanded such action and had obtained signed authorization cards from a majority of the company's production and maintenance employees. The Board further found that the company's unfair labor practices had rendered a fair rerun election unlikely. Finally, the Board found that ABQC and Staff Right were joint employers but that since Staff Right neither knew nor should have known about the company's discriminatory activities, Staff Right was not jointly liable for the above conduct.

The Board ordered ABQC to cease and desist from the unfair labor practices and any other interference with the employees' exercise of their § 7 rights. *See* 29 U.S.C. § 157. The order required ABQC to offer reinstatement (or the substantial equivalent), and recovery of lost earnings and benefits to Mills, Proffitt, Nixon and all first-shift bargaining unit members laid off or terminated after July 18, 1991. Further, the Board's order required ABQC to recognize the Union and, on request, bargain with the Union as the exclusive bargaining representative of employees of the appropriate unit.

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The Supreme Court has held that the Board has the authority to issue such orders in order to prevent unfair labor practices which "have the tendency to undermine majority strength and impede the election process." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969); *see also NLRB v. Hicks Oils & Hicksgas, Inc.*, 942 F.2d 1140, 1141-42 (7th Cir. 1991); *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156,1158 (7th Cir. 1990). To guide the NLRB in imposing this remedy, the Court concluded:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

Gissel, 395 U.S. at 614-15.

An employer does not have to grant union recognition immediately when confronted by a recognition demand based on possession of cards allegedly signed by a majority of the employees. Rather, in certain circumstances, an employer can insist on an election. *Gissel*, 395 U.S. at 591. "If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the board may

withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations." *Gissel,* 395 U.S. at 591.

Before imposing a bargaining order, the Board must first review the nature of the unfair labor practices and the need for remedies. This Court's review of the Board's decision, once the Board has articulated the basis for its issuance of an order, is limited to whether the Board abused its discretion. *Montgomery Ward,* 904 F.2d at 1159 (quoting *Justak Bros.*, 664 F.2d at 1081). The Board must sufficiently analyze and discuss the adequacy of traditional remedies, "articulate the reason that traditional remedies would be inadequate to ensure a fair election," and "give specific reasons that justify its use of the bargaining order remedy." *Montgomery Ward*, 904 F.2d at 1159 (quoting *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1118 (7th Cir. 1973)). The Board must also provide a "detailed analysis assessing the possibility of holding a fair election . . and the potential effect of ordinary remedies." *Montgomery Ward,* 904 F.2d at 1159 (quoting *Peerless,* 484 F.2d at 1118).

In the instant case, in satisfying the requirements of *Gissel* and *Montgomery Ward,* the unanimous Board carefully examined the ALJ's recommendations, discussed the unfair labor practices which occurred and, most importantly, articulated specific reasons why the bargaining order is the only adequate remedy for the labor violations. The Board explicitly concluded that:

> [i]n agreeing with the [Administrative Law] judge that a *Gissel* bargaining order is a necessary component of the remedy in this case, we find that Respondent ABQC's course of misconduct, both pre- and

> postelection, clearly demonstrates that the holding of a fair election in the future would be unlikely.

The Board then proceeded to outline the principal unfair labor practices and their effect on the possibility of holding a fair election. The Board determined that "the possibility of erasing the effects of the Respondent's unfair labor practices is slight and the holding of a fair election unlikely." 313 N.L.R.B. 52 (1993). The Board thus recognized that "[a] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct," *Gissel*, 395 U.S. at 612. The Board concluded, "Because of the serious nature of the violations and because the Respondent's egregious misconduct demonstrates a general disregard for the employees' fundamental rights, we find it necessary to issue a broad order requiring the Respondent . . . to bargain with the Union."

The Board properly determined that the events surrounding the election fell into what we have previously termed the " 'classic' bargaining case . . . the *Gissel*-type circumstance where the employer has thwarted its employees' efforts at organizing union representation." *Ron Tirapelli Ford*, 987 F.2d at 441. ABQC engaged in an election campaign which included threats by supervisors to be carried out in the event that the Union prevailed, interrogations, withholding of benefits and a refusal to bargain. Given both the ALJ's and Board's findings, we will not disturb the conclusion that ABQC's actions rise to the level of misconduct that merits the imposition of a bargaining order as part of the remedy. *See, e.g., Montgomery Ward*, 904 F.2d 1156 (bargaining order imposed after supervisors' threats of violence, surveillance, interrogation, discharge of union leaders); *Impact Indus., Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1988) (bargaining

order imposed after a refusal to bargain, threats of plant closure, threats of discharge, and other egregious employer activities resulting in Union's election loss).

ABQC argues, however, that the passage of time and the change of membership in the bargaining unit makes the bargaining order inappropriate. Specifically, ABQC contends that the 3 to 4 year delay before the imposition of a bargaining order denied the parties due process of law. We reject ABQC's arguments that this several year delay eliminates the need for a bargaining order. Only in extreme circumstances, where the delay has been of considerable length, has this Court concluded that a bargaining order is too stale for enforcement. *See NLRB v. Thrill, Inc.*, 980 F.2d 1137, 1143 (7th Cir. 1992); *Montgomery Ward*, 904 F.2d at 1160. In *Thrill,* over a seven year gap existed between the time the ALJ issued the bargaining order and the Board's decision to impose the order. This Court emphasized the fact that the Board gave no reasons for the delay and concluded that in circumstances where the Board does not explain such a delay and there is a seven year gap, the bargaining order is stale. *Thrill*, 980 F.2d at 1143. In *Montgomery Ward*, an eight year gap existed between the election and the Board's order. This Court remanded for further consideration by the Board and noted that the passage of time can be a factor which the Board considers in determining the appropriateness of a bargaining order.

In the present case, there were no extreme gaps of time which would render the Board's order stale. The election occurred in June, 1991. The ALJ issued his opinion in March, 1993. The Board made its decision in November, 1993. The gap between opinions here was only four months, far short of the seven years in *Thrill*. Similarly, just over two years had passed here between the election and the Board's order as compared with the eight

years in *Montgomery Ward.* While we recognize the concerns over stale orders and changed circumstances, *see Impact Indus.*, 847 F.2d at 383, we also acknowledge the ordinary institutional time lapses inherent in the legal process.

III.

On cross-appeal, the Union argues that Staff Right should have been found jointly liable with ABQC for the unfair labor practices. Initially, the ALJ concluded that ABQC and Staff Right were not joint employers, and therefore could not be held jointly and severally liable for the back pay due employees as a result of ABQC's unlawful conduct. The Board, although concluding that ABQC and Staff Right were in fact joint employers,[1] agreed with the ALJ that ABQC was solely liable. The Board retroactively applied *Capitol EMI Music,* 311 N.L.R.B. 997, 1000 (1993), *enforced sub nom. Capitol EMI Music, Inc. v. NLRB,* 23 F.3d 399 (4th Cir. 1994) (table), which held:

> [I]n joint employer relationships in which one employer supplies employees to the other . . . both joint employers [will be] liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former

1. Respondents ABQC and Staff Right stipulated to their joint employer status during the period from April, 1991 to January 3, 1992 and admitted their joint employer status in their Answers to the complaint in the underlying unfair practice case. This is not an issue on appeal.

> has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

The Board further applied *Capitol EMI* in allocating the burdens of determining joint employer liability. In *Capitol EMI,* the Board stated:

> The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. [Footnote omitted].

In the instant case, the Board concluded that the Union met its burden of proving that ABQC and Staff Right were joint employers. The Board then determined that the burden shifted, and that Staff Right satisfactorily proved that it neither knew nor should have known of ABQC's unlawful actions. For this reason, the Board held that Staff Right was not liable for any of ABQC's actions.

We review the Board's decision with deference, examining the Board's findings and conclusions and verifying that its

determinations are supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Manley Truck Line, Inc.*, 779 F.2d 1327, 1330 (7th Cir. 1985); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts"). In the instant case, there is substantial evidence on the record considered as a whole to support the Board's findings and conclusions with regard to Staff Right. We agree with the Board's determination that although Staff Right and ABQC were joint employers, Staff Right neither knew nor should have known of the improper conduct and therefore is not jointly liable.

The Board properly applied *Capitol EMI* in determining the liability of Staff Right as a joint employer in the employment agency context. It concluded that "the undisputed evidence shows that Staff Right's role was limited to recruiting and supplying candidates for employment with ABQC and 'floating' the cost of ABQC's payroll from April 1991, to January 3, 1992." The Board determined that this limited role of Staff Right and the proffered testimony led to the determination that "Staff Right neither knew nor should have known about ABQC's discriminatory activities."

Substantial evidence in the record supports these conclusions and findings. Staff Right placed employees in the services of ABQC, advertised for, interviewed, screened and drug tested applicants. These activities, under the *Capitol EMI* framework, do not make Staff Right jointly liable. Although the Board ascertained that ABQC's transfer of employees to Staff Right's payroll was coercive, it was also reasonable for the Board to conclude that Staff Right did not know and had no reason to

know that this action was taken with an anti-union animus. ABQC only informed Staff Right that it was in a cash bind and requested that Staff Right temporarily assume its payroll obligations, with a promise to subsequently reimburse Staff Right. From the record as a whole, Staff Right took "no part in the daily direction of the employees, [did] not participate in their oversight, and [had] no representatives at the worksite." *Capitol EMI,* 311 N.L.R.B. at 1000.

The Union also contends that in ABQC's agreement with Staff Right, the employment agency reserved the right to question any decision by ABQC regarding the termination of any Staff Right-referred employee. This agreement, however, gave Staff Right the authority to question discharges of employees only during the employee's initial 45-day probationary period with the company. The record indicates that ABQC did not discharge any probationary employees. Furthermore, because Staff Right had no knowledge of any ABQC misconduct, it had no reason to question any of the discharges.

For the foregoing reasons, we ENFORCE the Board's order.

ENFORCEMENT GRANTED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE NATIONAL LABOR RELATIONS BOARD, THIRTIETH REGION DATED JANUARY 6, 1994

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Case 30-RC-5250

AMERICA'S BEST QUALITY COATINGS CORP. and STAFF RIGHT, INC., JOINT EMPLOYERS

Employer

and

UNITED ELECTRICAL, RADIO and MACHINE WORKERS OF AMERICA (UE)

Petitioner

ORDER SETTING ASIDE ELECTION, DISMISSING PETITION AND VACATING PROCEEDINGS IN CASE 30-RC-5250

Pursuant to a November 26, 1993 Decision and Order of the Board in 313 NLRB No. 52 (1993) wherein, inter alia, Case 30-RC-5250 was severed from Cases 30-CA-11425, 30-CA-11425-2, 30-CA11425-4, 30-CA-11580, 30-CA-11712, and 30-CA-11822; and wherein Case 30-RC-5250 was remanded to the undersigned, the challenged ballots of employees Robert Husslein, Paul Plonka, Stephen Iggens, Jason Rothwell and Raymond Tippet were opened and counted by the undersigned on December 16, 1993, in accordance with the Board's Rules and

Appendix B

Regulations. On that same date, a Revised Tally of Ballots was prepared and served on the parties. The Revised Tally of Ballots revealed that of approximately 72 eligible voters, 30 cast ballots for, and 34 cast ballots against, the Union; and there were 4 challenged ballots which were insufficient to affect the results. Thus, the Revised Tally of Ballots shows that the Petitioner has not received a majority of the valid ballots cast. Accordingly, and as directed by the Board, it is hereby

ORDERED that the election held in Case 30-RC -5250 on June 21, 1991 is hereby set aside, the petition filed in that matter on April 18, 1991 is hereby dismissed and the proceedings in Case 30-RC-5250 are hereby vacated.

Dated at Milwaukee, Wisconsin this 6th day of January 1994.

s/ Joseph A. Szabo
Joseph A. Szabo, Regional Director
National Labor Relations Board
Thirtieth Region
Suite 700, Henry S. Reuss Federal Plaza
310 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

APPENDIX C — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED NOVEMBER 26, 1993

America's Best Quality Coatings Corp. and Staff Right, Inc., Joint Employers *and* United Electrical, Radio and Machine Workers of America (UE), Cases 30-CA-11425, 30-CA-11425-2, 30-CA-11425-4, 30-CA-11580, 30-CA-11712, 30-CA-11822, and 30-RC-5250

November 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 1, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. Respondent America's Best Quality Coatings Corp. (ABQC), Respondent Staff Right, Inc. (Staff Right), the General Counsel, and the Charging Party each filed exceptions and supporting briefs. The Respondents, the General Counsel, and the Charging Party filed answering briefs, and the Respondents filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and

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1. In its answering brief, the Charging Party has moved to strike and/or disregard ABQC's exception or, alternatively, to strike ABQC's brief in support of exceptions. The Charging Party contends that ABQC did not comply with Sec. 102. 46(b) of the Board's Rules and Regulations inasmuch as ABQC filed a supporting brief in addition to exceptions containing extensive argument and authorities, and, together, the documents exceed the Board's 50-page limit. The Charging Party notes that ABQC did not file a request for permission to exceed that limit, pursuant (Cont'd)

has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.

(Cont'd)
to Sec. 102.46(j). Further, the Charging Party moves the Board to strike Staff Right's incorporation by reference of ABQC's exceptions and supporting brief into the Staff Right cross-exceptions as similarly failing to comply with the Board's Rules and Regulations.

Sec. 102.46(b)(2) of the Board's Rules states that any exception which does not comply with the requirements of Sec. 102.46(b)(1) "may be disregarded." Although ABQC's and Staff Right's exceptions are not in precise conformity with Sec. 102.46(b), we find that they are in substantial compliance with those requirements. Therefore, we deny the Charging Party's motion.

2. The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the judge's decision to overrule Objections 10, 14, and 17, and sustain Objection 21.

3. The General Counsel has excepted to the judge's failure to conclude that the Respondent violated Sec. 8(a)(1) of the Act when Supervisor Keith Stanosz interrogated employee Robert Person about why Person needed a union. We find it unnecessary to pass on this issue because such a violation, even if found, would be cumulative and have no effect on the remedy.

In sec. III, part C of his decision, the judge credited the testimony of employees Robert Nixon, Calvin Jones, and Timothy Mays, and concluded that ABQC violated Sec. 8(a)(1) when Supervisor Keith Stanosz impliedly threatened them in his remarks concerning their transfer from the ABQC payroll to the Staff

(Cont'd)

Appendix C

1. The judge found it unnecessary to pass on whether the early June 1991[4] conversation between ABQC's labor attorney, Terrance Schuster, and employee Keith Mills constituted a violation of Section 8(a)(1) of the Act. The judge found that such a finding, not alleged in the complaint, would be cumulative. The judge nonetheless proceeded to discredit Mills, finding it unlikely that Schuster would have told Mills wages would go down if ABQC had a union. Finally, the judge concluded that Schuster's question to Mills, a known union supporter, did not violate the Act. In adopting the judge's conclusion that ABQC did not violate the Act, we rely on the judge's discrediting Mills' version of the conversation.

2. The judge found that during the first week of June, Respondent's president, Robert Peterson, interrogated employee Jasper Hicks at his workstation, initiating a conversation about the Union and asking Hicks how he felt about the Union. The judge found that the circumstances of the conversation, i.e., a company president's interrogating an employee at his

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(Cont'd)
Right payroll and also interrogated them about the Union. The judge inadvertently erred in crediting Calvin Jones because Jones never testified at the hearing in this case. We nevertheless agree with the judge, based on the testimony of Mays and Nixon, that ABQC violated Sec. 8(a)(1) by Stanosz' remarks and interrogation.

Also in sec. III, part C of his decision, the judge inadvertently credited testimony of employee Steve Grady in finding that ABQC violated Sec. 8(a)(1) by Supervisor Sheryl Valente's threats to impose more restrictive working conditions on employees if they chose union representation. Grady did not testify. In agreeing with the judge that ABQC so violated the Act, we rely on the testimony of employees Glearon Scott and Jeff Heppe.

4. All subsequent dates are in 1991 unless stated otherwise.

workstation, tended to show coercion. The judge, however, denied the General Counsel's motion to amend the complaint to include a corresponding allegation of unlawful interrogation because the judge found that such a violation would be cumulative. We disagree with the judge that this violation would be merely cumulative, in view of the president's direct involvement in the unlawful activity. As the judge aptly stated, this incident "shows that [ABQC], at the highest level of management, was willing to . . . cross the line between casual and coercive conversation in order to attempt to influence the outcome of the forthcoming election." Although not alleged in the complaint, this matter was fully litigated at the hearing. Accordingly, we shall grant the General Counsel's motion to amend the complaint to conform to the proof and find that ABQC violated Section 8(a)(1) of the Act.[5]

3. The General Counsel and the Charging Party have excepted, inter alia, to the judge's failure to find Staff Right to be a joint employer with ABQC. The judge found that the relationship between ABQC and Staff Right did not satisfy the test for joint employer status because Staff Right neither performed management services nor exerted significant control over the ABQC employees in a manner that meaningfully affected terms and conditions of employment. The judge concluded that, inasmuch as Staff Right was not a joint employer, the remedy in this case should only involve ABQC. The General Counsel and the Charging Party argue that the Respondents admitted in their answer to the complaint and stipulated at the hearing that they were joint employers during the time period April 1991 to January 3, 1992. The General Counsel and the

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5. Chairman Stephens finds it unnecessary to pass on the issue of whether the interrogatories of Hicks violated the Act because the finding of such an additional violation would be cumulative and would not affect his decision on the remedy.

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Charging Party request that the Board find Staff Right jointly and severally liable for the backpay due employees arising from ABQC's unlawful conduct during that time period.

We agree with the General Counsel and the Charging Party that ABQC and Staff Right were joint employers from April 1991 to January 3, 1992, based on the answer to the complaint, as well as the parties' stipulation at the hearing. We agree with the judge, however, that the remedy in this case should involve ABQC alone. In *Capitol EMI Music*, 311 NLRB No. 103, slip op. at 4 (May 28, 1993), the Board held as follows:

> [I]n joint employer relationships in which one employer supplies employees to the other, . . . both joint employers [will be] liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it. [Footnote omitted.]

The Board in *Captiol EMI* set forth the following allocation of burdens for determining whether the nonacting joint employer will be held liable for the unlawful actions of the other joint employer:

> The General Counsel must first show (1) that

> two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. [Footnote omitted.]

Ibid.

Applying the *Capitol EMI* standard to the facts of this case, we find that the General Counsel has carried his burden of showing that ABQC and Staff Right were joint employers during the period from April 1991 through January 3, 1992. We also find for the reasons stated by the judge that ABQC violated Section 8(a)(3) by laying off and delaying the recall of the first shift plating department employees, by suspending and terminating Michael Proffitt and Keith Mills, and by terminating Lisa Nixon. Thus, the burden shifts to Staff Right to show that it neither knew nor should have known of ABQC's unlawful actions.

We are satisfied that Staff Right has met this burden because the undisputed evidence shows that Staff Right's role was limited to recruiting and supplying candidates for employment with ABQC, and "floating" the cost of ABQC's payroll from April 1991 until January 3, 1992. The decision to hire a candidate was exclusively made by ABQC; once hired by ABQC, all employees

worked subject to terms and conditions of employment determined by ABQC alone. Staff Right President Jim Lazear testified that after employees began working at ABQC, Staff Right had nothing to do with their situations at work "other than provide them a W-2." It is clear from the record that Staff Right was never consulted about any of ABQC's decisions to lay off, recall, suspend, or terminate employees. We can infer from the record that Staff Right neither knew nor should have known about ABQC's discriminatory activities. We therefore find that remedying the unfair labor practices found in this case is solely the responsibility of ABQC.[6]

4. The Respondents have excepted to the judge's imposition of a *Gissel*[7] bargaining order. They assert that the judge failed to justify imposition of such an extraordinary remedy by demonstrating that the traditional remedies available to the Board would not ensure that a fair election could be held. We find no merit in the Respondents' arguments.

In agreeing with the judge that a *Gissel* bargaining order is a necessary component of the remedy in this case, we find that Respondent ABQC's course of misconduct, both pre and postelection, clearly demonstrates that the holding of a fair election in the future would be unlikely. In that regard, we note that ABQC's misconduct during the critical preelection period included transferring its employees to Staff Right's payroll on the

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6. Member Raudabaugh believes that, in a joint employer relationship, each employer is responsible for the unfair labor practices of the other. See his dissenting opinion in *Capitol EMI.* Accordingly, unlike his colleagues, he would find that Staff Right is responsible, along with ABQC, for the unlawful conduct involved herein.

7. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

day after the Union demanded recognition and filed the representation petition, various threats and interrogations by Supervisors Stanosz and Valente, unlawfully delaying promised raises and vacations based on the upcoming election, and personal visits by Company President Petersen to employees' workstations. On one occasion, Petersen unlawfully interrogated employee Hicks at his workstation about the Union and, on another occasion, Petersen directed employee Mills to remove a prounion sign from his work area even though an antiunion sign remained posted at the nearby workstation of employee Torres. Additionally, ABQC "stacked" the bargaining unit by hiring new employees in order to dilute the Union's strength.

Furthermore, the unfair labor practices intensified after the inconclusive June 21 election. The course of unlawful conduct included the mass layoff and delayed recall of the first shift plating employees, the continued withholding of raises and vacations pending resolution of the election objections, only to be followed by the sudden grant of benefits after the mass layoff, and the discharges of prounion employees Michael Proffitt, Keith Mills, and Lisa Nixon.

The coercive effect of the Respondent's misconduct cannot be denied. The transfer of employees from ABQC's payroll to Staff Right's payroll was announced by President Petersen himself and reasonably caused employees to fear that they were no longer "permanent" employees of ABQC, but only "temporary" employees of Staff Right. When employees questioned Supervisor Stanosz about the change, he advised them that "they was trying to scare [the employees] off of the Union." Thus, the Respondent utilized the transfer device to impress upon employees that it controlled their employment to the exclusion of any outside organization that might attempt to

improve their working conditions. The impact of this change was magnified by the fact that it was communicated by the Respondent's president and it occurred on the day after the union demanded recognition. See *Astro Printing Service*, 300 NLRB 1028, 1029 (1990).

The discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten. This unlawful conduct, which "goes to the very heart of the Act," *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), directly affected approximately one-third of the bargaining unit. The likely result of such action was to reinforce the employees' fear that they would lose employment if they persisted in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987).

The Respondent's postelection grant of benefits was another highly coercive unfair labor practice. The Respondent utilized a classic "carrot and stick" approach, first denying the employees expected wage reviews and paid vacations before the election, and then granting such benefits after the election. As the Supreme Court has long recognized, employees are quick to perceive the "fist inside the velvet glove" implicit in such tactics. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). And the Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees" *Triec, Inc.*, 300 NLRB 743, 751 (1990), enfd. 946 F.2d 895 (6th Cir. 1991).

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We also note that the Respondent impaired the integrity of the Board's election process by hiring, immediately before the eligibility cutoff date, several employees thought likely to vote against the Union. The Respondent's willingness to engage in such unit packing casts serious doubt on whether a fair election could be held.

Finally, we find, contrary to the Respondent's contention, that evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order. See *F & R Meat Co.*, 296 NLRB 759 (1989). Furthermore, even assuming that employee turnover would be a relevant factor in an appropriate case, this is not such a case. As the judge noted, there is "a clear causal connection" between the turnover in the unit and the Respondent's illegal conduct of laying off the day shift plating department and delaying the recall of employees most likely to have been union supporters. Even courts that examine employee turnover caution that an employer is not to be rewarded for its own misconduct and limit consideration of that factor to cases where the turnover was not of the employer's own making. *NLRB v. Balsam Village Management Co.*, 792 F.2d 29, 34 (2d Cir. 1986), enfg. 273 NLRB 420 (1984).[8] Finally, to the extent that some employee

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8. The Respondent's reliance on *Impact Industries v. NLRB*, 847 F.2d 379 (7th Cir. 1988), is misplaced. There, the court remanded the bargaining order issue to the Board because it had failed to consider evidence the respondent attempted to present concerning turnover in employees and management during the long time the case was pending at the Board. Here, we have fully considered the evidence the Respondent refers to. Further, in the instant case, the Respondent is not claiming that changes in management occurred, and there is no period of delay comparable to that involved in *Impact*. Furthermore, we note that in its subsequent decision in *Ron Tirapelli Ford, Inc. v. NLRB*, 987 F.2d 433, 440 (7th Cir. 1993), the court cautioned

(Cont'd)

turnover occurred that is not the product of the Respondent's unfair labor practices, it "should not be a controlling factor." *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981).

In sum, the Respondent's course of misconduct emanated from upper level management, was swift and severe, persisted during the postelection period, and directly affected a substantial proportion of the unit employees. Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondent's unfair labor practices is slight and the holding of a fair election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate.

AMENDED REMEDY[9]

Because of the serious nature of the violations and because the Respondent's egregious misconduct demonstrates a general disregard for the employees' fundamental rights, we find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act, *Hickmott Foods*, 242 NLRB 1357 (1979), and to bargain with the Union.[10]

(Cont'd)
that in *Gissel* cases the Board must be careful to balance several concerns, including not permitting an employer to profit from its own wrongful refusal to bargain. As discussed above, we find that that is the situation here with respect to the Respondent's reliance on the turnover factor.

9. Nothing in this Decision and Order shall be construed as requiring ABQC to rescind any benefits without a request from the Union. See *Vibra Screw, Inc.*, 301 NLRB 371 fn.2 (1991).

10. We note that President Petersen's confiscation of prounion literature from employee Mills' workstation was alleged and found to be objectionable
(Cont'd)

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Additionally, in the event a bargaining order takes effect without a certification of representative, we shall order that the election held in Case 30-RC-5250 shall be set aside, and that the petition in that matter be dismissed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, America's Best Quality Coatings Corp., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, by interrogating employees concerning their union sympathies, by threatening employees that benefits would be withheld and that it would impose more onerous working conditions, and by telling employees that they were transferred to the payroll of a temporary employment service to scare them off the Union."

(Cont'd)
conduct. No party filed exceptions to this finding. Inasmuch as this conduct was not alleged to have violated Sec. 8(a)(1), we shall amend the judge's recommended Order to remove the cease-and-desist provision inadvertently included therein.

We shall also modify the reinstatement language in par. 2(a) of the judge's recommended Order to conform to that traditionally used by the Board.

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2. Substitute the following for paragraph 1(f).

"(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Offer Keith Mills, Michael Proffitt, Lisa Nixon, and all bargaining unit members of the day shift plating department laid off or terminated on or after July 19, 1991, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, including wage increase and vacation benefits that may have been illegally delayed or not provided, in the manner specified in the remedy section of the judge's decision.

"(b) Remove from its files any reference to the unlawful terminations and layoffs and notify the employees in writing that this has been done and that the terminations and layoffs will not be used against them in any way."

4. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 30-RC-5250 is severed from Cases 30-CA-11425, 30-CA-11425-2, 30-CA-11425-4, 30-CA-11580, 30-CA-11712, and 30-CA-11822, and remanded to the Regional Director for Region 30, that the ballots

of Robert Husslein, Paul Plonka, Stephen Iggens, Jason Rothwell, and Raymond Tippet be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations, and that he prepare and serve on the parties a revised tally of ballots. If the revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 30-RC-5250.

Dated, Washington, D.C. November 26, 1993

James M. Stephens,	Chairman
Dennis M. Devaney,	Member
John Neil Raudabaugh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate or lay off any employees or otherwise discriminate against them in retaliation for union activities or other protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act by interrogating employees concerning their union sympathies, by threatening employees that benefits would be withheld and that we would impose more onerous working conditions, and by telling employees they were transferred to the payroll of a temporary employment service to scare them off the Union.

WE WILL NOT delay expected wage increases or reviews and vacations or give such benefits in a manner that interferes with employees' Section 7 rights.

WE WILL NOT promulgate rules or an employee handbook with unilateral changes in terms and conditions of employment without notice to or bargaining with the Union.

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WE WILL NOT fail or refuse to recognize and and bargain in good faith with United Electrical, Radio and Machine Workers of America (UE), as the exclusive bargaining agent of our employees in the following appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Keith Mills, Michael Proffitt, Lisa Nixon, and all employees of the day shift plating department laid off or terminated on or after July 19, 1991, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, including wage increases and vacation benefits that may have been illegally delayed or not provided, in the manner specified in the remedy section of the judge's decision.

WE WILL notify them in writing that we have removed from our files any reference to their terminations and layoffs and that

the terminations and layoffs will not be used against them in any way.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit, with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind any changes in terms and conditions of employment that were unilaterally made on or after April 18, 1991, and retroactively restore preexisting terms and conditions of employment.

AMERICA'S BEST QUALITY COATINGS CORP.

APPENDIX D — DECISION OF THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES DATED MARCH 1, 1993

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 30-CA-111425
30-CA-11425-2
30-CA-11425-4
30-CA-11580
30-CA-11712
30-CA-11822
30-RC-5250

AMERICA'S BEST QUALITY COATINGS CORP. AND STAFF RIGHT, INC., JOINT EMPLOYERS

and

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, (UE)

Gerald McKinney, Esq., of Milwaukee, WI,
for the General Counsel.

Mary E. Leary, Esq., of Pittsburgh, PA,
for the Charging Party.

Fred G. Groiss, Esq. and *Jose Luis Martinez, Esq.*,
of Milwaukee, WI, for the Respondent.

DECISION

Statement of the Case

Richard H. Beddow, Jr., Administrative Law Judge: This matter was heard in Milwaukee, Wisconsin, on June 15 — 18, and August 10 — 13, 1992. Subsequent to an extension of the filing

date, briefs were filed by all parties.[1] These proceedings were based upon an original charge filed July 2, 1991,[2] by United Electrical, Radio and Machine Workers of America. The Regional Director's consolidated complaint dated May 1, 1992, embraces numerous additional charges as well as election objections filed June 28, 1991, by United Electrical, Radio and Machine Workers of America. The Regional Director's consolidated complaint dated May 1, 1992, embraces numerous additional charges as well as election objections filed June 28, 1991, by the Union, alleging various violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act which occurred both before and after an election held on June 21.

At the resumption of the hearing on August 10, 1992, Case No. 30-CA-11822, a complaint alleging illegal discharge under Section 8(a)(1) and (3) of the Act, was consolidated with the other cases.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent America's Best Quality Coatings Corp. (ABQC), is a corporation engaged in metal plating operations at a Milwaukee facility.

It annually provides services valued in excess of $50,000 for

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1. The General Counsel's brief embraces a Motion to correct certain errors in the transcript. The corrections requested are appropriate and the Motion is hereby granted.

2. All following dates will be in 1991 unless otherwise indicated.

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Allen Bradley Corporation an enterprise in Wisconsin which annually sells and ships goods and materials valued in excess of $50,000 directly to points outside Wisconsin. Respondent Staff Right, Inc., operates an employment service in Milwaukee and provides services valued in excess of $50,000 for other Wisconsin businesses who sell and ship non-retail products valued in excess of $50,000 directly to points outside Wisconsin. It is admitted that at all times material Respondent had been an employer engaged in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

ABQC is a closely held Wisconsin corporation with co-owners William Nimtz and Joel Lee each being 50 percent stockholders. It began operations in June 1990, after purchasing the then union organized[3] metal plating operations from Allen Bradley Company and began non-union operations at the same location and facility almost immediately thereafter with over 99 percent of its metal plating work being performed for Allen Bradley Company.

Staff Right, Inc., is engaged in the business of providing skilled and unskilled blue collar workers in the Milwaukee metropolitan area. It provides these services to numerous employers (many of them unionized), in addition to ABQC.

Staff Right, began serving ABQC as a result of a competitive

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3. The Allen Bradley Company employees were represented by Local 1111 of the International Union. Local 1111 is not a party to these proceedings.

bidding process and it supplied production and maintenance employees who remained on the Staff Right, payroll for 45 days during which time Staff Right was responsible for handling their payroll including making all necessary tax deductions. No particular employees were ever requested by ABQC and it never received any instructions from ABQC as to what should be done as to the position of applicants on unions.

In April 1991, it entered an arrangement with ABQC to "float" the cost of the payroll and employees were placed on Staff Right's payroll for this purpose only. This relationship ended in January 1992 and reverted to the recruitment and supply of employees.

Under these circumstances, I am persuaded that the relationship between ABQC and Staff Right, does not satisfy the appropriate test for determining joint employer status because Staff Right does not, in conjunction with ABQC, perform management services or exert significant control over the same employees in a manner that "meaningfully affects matters relating to the employment relationship in firing, discipline, supervision and direction, see *Osco Drug, Inc.*, 294 NLRB 779 (1989). Accordingly, I find that Staff Right is not a joint employer and, in view of conclusions otherwise reached below I conclude that the Remedy sought in this proceeding should involve only Respondent ABQC.

As a new Employer located in a "private enterprise" or "development" zone, ABQC was eligible for certain government tax breaks and wage subsidies, provided residents in that low income area, and certain others, were hired as employees. Thereafter, from June 1990 until at least November 1991, a majority of ABQC's work force consisted of minority employees,

most of whom were Black African-American (Black) and Hispanic. Most, if not all, of the aforesaid employees were poor, hard to employ, disadvantaged persons earning under $10,000 annually. The majority of these employees had also been placed at ABQC through Staff Right.

Gene Plonka was ABQC's first president from June 1990 until approximately October 1990 at which time, because of illness, he was succeeded by Robert Petersen. Petersen remained president for approximately 1 year, until November 30, 1991, at which time he was succeeded by the current president, Robert Adikes.

In 1990 employees were hired at $5.50 per hour and promised a 50-cent raise upon completion of their probationary periods and periodic raises thereafter in anticipation that upon their 1-year anniversary date, they could be earning up to $10 per hour with a 1-week paid vacation. After Plonka became ill in September 1990, Petersen met with the employees and informed them that the probationary period was being changed from 90 to 60 days; that employees would get their 1-week paid vacation and a raise at their 1-year anniversary date; but that the amount of the raises would be determined by a "rate review."

In late March 1991, employees became increasingly concerned over the effect of Plonka's terminal illness on promised raises and other personnel matters and employees Michael Proffitt, Keith Mills, Sonny Anderson, Lisa Nixon, Robert Person, Virginia Boyde and Curits Celske[4] met and

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4. Celske was the only non-Black employee in this group, and the only one not working on first shift in the plating department. As of April 18, Respondent's first shift plating department consisted of 24 employees; 12 of whom were Black, 5

(Cont'd)

designated Celske to contact the Union's field organizer, Beth Levie, about how they should go about forming a union.

Celske then circulated a petition of interest for union representation among Respondent's approximately 62 to 64 employees. The petition, with addresses and telephone numbers, was signed by 33 employees, 15 of which were from the first shift plating department.

Respondent was made aware of the petition of union interest when several employees showed it to supervisor Jane Lewandowski, in Petersen's absence, and informed her that they ". . . wanted to be recognized as a group or as a union and that they wanted to talk to Petersen about some of the conditions and wages. . . ." Lewandowski replied she was not in a position to answer any of their questions and the petition was returned. Supervisor Keith Stanosz also saw the petition and then asked employee Robert Person why he needed a union.

Union representative Levie thereafter met with 20 employees and obtained signed authorization cards and by April 18 the Union had secured 34 valid union membership/ authorization cards from employees. As of June 21, and prior to the NLRB-conducted election, the Union has secured an additional 10 cards for a total of 44. The introductory portion of the cards read (both in English and Spanish):

I hereby request and accept membership in

(Cont'd)
of whom were Hispanic and 7 of whom were Caucasian. Three of these employees, Jacqueline Williams (Black,), Lee Ramirez (Hispanic) and David Claudio (Hispanic) were non-supervisory leadpersons.

> the above named union, and authorize it to represent me, and in my behalf to negotiate and conclude all agreements as to hours of labor, wages, and all other conditions of employment.

On April 18, Union representatives Levie and Bob Clark, together with employees Proffitt, Mills, Nixon, Anderson, Boyde, Jasper Hicks, LeMon Ward and Robert Person, unsuccessfully demanded voluntary recognition after indicating that a majority of workers had signed union cards. Immediately thereafter, the Union filed a representation petition.

Pursuant to the representation petition and a Stipulated Election Agreement an election was conducted on June 21, among employees in the following appropriate Unit:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The results of the election as set forth in the Tally of Ballots show that of approximately 72 eligible voters, 30 cast votes for and 29 cast votes against the Union. There were nine challenged ballots which were sufficient in number to effect the results of the election.

Several employees testified that on April 19, the day after

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Respondent declined voluntary recognition of the Union, Petersen met with all employees and announced that, henceforth and for an indefinite period, employees were being transferred to Staff Right's payroll instead of ABQC's payroll, due to "cash flow" problems. Petersen, however, testified the effective date of the transfer was actually April 7 and that he was not sure of the date he met with the employees regarding this payroll transfer matter but guessed being "between April 7 and 12," or "somewhere in that area." As a result of the announcement employees became "very upset, very scared" because they felt that they were now "temporary" employees of Staff Right, the employment service, instead of having the "permanent" status they had attained with ABQC. As "temporary" employees, a status most had previously held with Staff Right when first hired, they felt they no longer possessed the job security or protection they had with ABQC. Moreover, as temporary employees, they felt they would no longer be considered trust worthy regarding such things as car loans.

Thereafter conversations and events occurred based on this subject and on other matters concerning the Union election which bear on several alleged violations of the Act. These events, as well as certain other events that occurred subsequent to the election, will be discussed in the "Discussion" section of this Decision.

On July 15, Union organizing committee members Proffitt, Mills and Hicks were given warnings for alleged poor attendance. They jointly conferred with Union representative Levie and on July 17, went as a group to Petersen's office to protest the warnings. They each gave Petersen, in the presence of Supervisor Keither Stanosz, a formal grievance written on the Union's standard grievance form entitled "UE Grievance Form."

Petersen took the grievances from the three employees, but refused to formally accept them, stating Respondent did not recognize the Union.

One or two days prior to July 18, the organizing committee met and drafted a petition demanding promised raises and vacations. It was signed by 29 employees and delivered to Petersen during the 9:10 a.m. work break on July 18. Nearly 30 employees went to the area near Petersen's office and gave him the petition together with a document (Exhibit 27) which cited various NLRB and court cases supportive of the organizing committee's demand for payment by Respondent of the promised wage increases and paid vacations. Mills, Proffit and Nixon were the principal spokesmen. After Mills told Petersen the law provided the employees were entitled to the raises and paid vacations inasmuch as these benefits had been previously promised, Petersen replied the petition and other document ". . . meant nothing to him and that he was tired of having everyone come to his office." He said he would not do anything until the NLRB ruled on the pending Union challenges and the objections. Petersen also, as credibly testified to by Keith Mills, referred to the ongoing union activities and told the employees, ". . . if you [have] an *attitude* you [will not] be getting no raise or . . . vacation."

Later that morning at about 11:30 a.m., leadman David Claudis informed supervisor Stanosz that valves had been opened without authorization on several of the plating machines tanks causing acid to drain to a holding area in the basement resulting in an unsafe working condition because the acid storage tank had risen to near its holding capacity. Stanosz feared another such act could result in serious damage to the plant or employees and he said he determined to send the employees home for the remainder

of the day. After notifying Petersen, he then punched the timecards of all these first shift plating department employees and released them from work at 12:30 p.m. Respondent did not contact either the fire or police department, health department or OSHA. After being told to go home, the majority of the employees went to the nearby Union office where the Union was informed of what had occurred.

When the first shift plating department employees arrived the next day in time for their shift, all except for the three leadpersons, were denied entry by Petersen. They were then sent a letter saying the first shift was being discontinued until the risk of reoccurring misconduct was eliminated.

On July 22 employees began informational picketing to protect Respondent's apparent lockout. Pickets included employees Mills, Proffitt, Nixon, Boyde, LeMon Ward, Jasper Hicks, Bryan Thompson and Sonny Anderson and picketing continued for 6 weeks.

On July 27, Petersen sent a letter to all first shift plating department employees in which he refers to "present production requirements," etc. being the reason for lack of recall, specifically stating:

> This letter is to inform you that due to current production levels in the Plating department, we are unable to bring back the entire work force. We are currently only filling those positions that are needed to satisfy present production requirements. These positions are being filled by the most qualified individuals. Unfortunately, current production needs do

> not warrant recalling you at this time. However, your name has been placed on a preferential recall list and you will be notified when work is available. I regret this current condition of affairs and hope we can get as many employees back to work as soon as possible.

Employee's were not recalled based upon what machine they had been operating on July 19th. From July 19 forward, Respondent utilized the three leadpersons *and* the second shift plating department employees and, these employees were working as much as 4 hours overtime per day. (Stanosz asserted that they maintained regular hours, however, this is not documented by relevant records available to Respondent.) When Robert Person was recalled on November 7 he believed that he was the first black to be recalled and that first shift plating employees were working more overtime than they had prior to July 19.

The Respondent also received information assertedly given to Petersen from employees Dan and Dave Roark that Mills and Proffitt were in the area of the tanks that were drained and that they were laughing and referring to getting their vacations at the Union hall after being released from work on the July 18. On July 27 both Mills and Proffitt were given letters of suspension pending investigation of the drainage incident. Interviews with Petersen and Company Counsel were held and claims were made that Respondent had 13 witnesses to place them in the area and that Respondent had 12 sworn affidavits that they were seen causing the acid drain. Both denied any involvement but they were discharged by letters dated February 24, 1992.

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On or about July 27, merit wage reviews and a week of paid vacation were unilaterally awarded to employees and Respondent made admitted changes involving employees' wages, hours and conditions of employment. Most of the unilateral changes are set forth in Respondent's first-ever employee handbook which issued in early September and Respondent stipulated that all such changes were unilaterally made without notice to, or bargaining with, the Union. The Respondent also applied a drug screening for all recalled employees and, when Nixon's November test resulted in a positive finding, she was discharged.

Sonny Anderson was recalled in December. On July 20, 1992, Anderson had a dispute with Supervisors Habel and Stanosz over a change in his job assignment, Anderson left the work place after being told by Stanosz that he could leave if he didn't like it. Anderson then called president Adikes who said he had heard of the incident but had not yet had a chance to investigate. The next day Anderson was terminated for "getting into supervisors faces" on July 20.

III. Discussion

The issues in these cases arise from the events surrounding the terminal illness of a start up company's president, employees' concern over anticipated wages and benefits, a union election, the sudden mass layoff of all of the first shift plating employees, and a protracted delay in the recall of laid off employees, especially those who were union sympathizers.

A. *Ballot Challenges*

Of 68 ballots cast, 30 were for the Union, 29 against and 9

were challenged. The Board challenged *Raymond Tippet's* ballot as he was not included in the "Excelsior" list[5] of eligible voters furnished to the Union. The testimony of supervisor Lewandowski shows that Tippet was working at the company prior to the payroll eligibility date and that she accidentally failed to use updated computer date when she prepared the list. Respondent asserts that it substantially complied and did not act in bad faith, citing cases that indicate such an omission does not warrant a new election. The General Counsel's brief does not address this issue and, inasmuch as Tippet otherwise is within the unit, I conclude that his vote properly may be counted and the challenge therefore is overruled.

Robert Husslin is alleged to be a supervisor because of his title as "maintenance supervisor," however, he is the supervisor only of himself as he is the only one in his department and he is, factually, the janitor (with maintenance type duties). The fact that he has parking privileges and office access relates to his unusual work hours and duties and otherwise he performs no supervisory functions. I find he is not a statutory supervisor and that the challenge to his ballot should be overruled.

Al Habel was listed on Company charts and in his performance review as second shift supervisor and no other person with supervisory status was at the plant for most of the second shift. He is salaried, was given a vacation, wears clothing like other supervisors (not the employees coveralls), has parking privileges, instructs employees on their job duties, has fired and disciplined employees and, prior to the election, was considered by other employees to be a supervisor.

If Habel was not a supervisor (at the time of the election),

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5. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

some 13 employees on the second shift would be unsupervised and an opened, operating plant with an inventory of costly machinery and materials would be functioning for up to 8 hours a day with no on-site supervision. Clearly, Habel was the highest ranking employee on his shift and, his duties subsequently were also designated as supervisory duties by the Respondent when after the election it formally recognized and entitled him as a supervisor, and, accordingly, I find that Habel was a statutory supervisor at the time of the election, see *Schnuck Markets, Inc. v. NLRB,* 961 F.2d 700 at 706 (8th Cir. 1992), and cases cited therein. I therefore find that the Union's challenge to his ballot should be sustained.

Kasey Lee Nimtz (also known as Ki-Ki Nimtz), is the daughter of William Nimtz who own 50 percent of Respondent ABQC's stock. She was a student at the University of Wisconsin, Eau Claire, from 1987 to 1989 majoring in business, and thereafter at the University of Gainesville in Florida from 1989 to 1991 majoring in economics. During the summer she would return home and work for Respondent on a full time basis. She wore slacks, shirts, blouses, etc., but not a uniform as did other bargaining unit employees and she generally worked in the administrative offices. When ABQC first opened, Ki-Ki Nimtz interviewed and hired several of the production and maintenance employees. Prior to the election Nimtz was trained to act as a production planner, assertedly not a front office job and a job also sometime performed by Ruth Zinns whose ballot also was challenged. Although Nimtz may have trained for a position that might make her a "dual function" employee, it is clear that she did and could exercise supervisory functions as the daughter of the owner and otherwise the record supports the conclusion that her interest are aligned with management and that she had a lack of community of interest with unit employees. Accordingly, the challenge to her ballot is sustained.

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Ruth Zinns is the assistant to office supervisor Jane Lewandowski and is now called the office clerk. Prior to and at the time of the election she had no title but performed these duties for Lewandowski except for a time in April or May 1991, when she spent up to 6 hours a day as a replacement for production planner Jackie Kobs. A few weeks prior to the election Ki-Ki Nimtz took over that job. Unlike production employees, Ruth Zinns was employed principally as an office clerk from the period of September 1990 to the present. Like those in management, Zinns parks in the enclosed garage, has keys to the facility, and is a salaried employee. Zinns normally works in the administrative offices area separate from the production and maintenance area, she is not required to wear a uniform, and unlike unit employees, she was entitled to and received a vacation in August 1991. Zinns was authorized to sign documents on behalf of the Company required to be sent to the State for the Private Industry Council. She was also responsible for compiling confidential payroll information such as contained on the Employee Rate Master which includes employees names, their clock numbers, their shift, rate of pay, hours worked for the month, bonus dollars earned, whether they were entitled to a bonus, and the bonus dollars paid as well as all health insurance forms for employees and management personnel.

While Zinns may have had a "dual function" role in April or May she left that position well before the election on June 21, and she has functioned principally as an office clerical, a classification excluded from the unit. Moreover, Zinns is a confidential employee who does not share a sufficient community of interest with the bargaining unit workers inasmuch as she works in a physically distinct location with little interchange with production and maintenance employees and has apparent authority to sign commitments for the employer and to

assist in effectuating management policies. Accordingly, the objection to her ballot is sustained.

Inna Strupinsky began work on June 16, 1990, she has a degree in chemistry (from the Soviet Union) and uses this knowledge in her operations in Respondents waste water treatment department. She is not supervised by anyone connected to the production, warehouse, or maintenance departments. Her duties and responsibilities since September 1991, include analyzing chemical waste and performing analytical control of all chemical plating waste. Prior to that time, she operated the waste water treatment facility exclusively. She supervised the waste water treatment facility and maintained the necessary levels of chemicals by making the correct additions to achieve the best results for the waste water treatment. In doing so, she communicated with Al Niesen, who was a supervisor and in care of chemical analytical control for the plating facility and also for the waste water treatment along with Strupinsky. Niesen was subsequently replaced with John Harvey and Dave Anderson. Harvey's job was permanently located in the chemical lab as is Strupinsky's, and Anderson is a chemical engineer who is located on the first floor in a special office in the production area where he takes care of the plating facility. Strupinsky gives instructions about the appropriate amount of chemicals to be added for the treatment of the waste water from the plating department to engineer Anderson, however, she does not deal with any workers in the production department. Strupinsky is salaried and she earned and received a vacation (two weeks in 1992). She wears a lab coat, not a uniform and works in an area and at hours different from those of the production employees.

Under these circumstances, I find that prior to August 1991, Strupinsky's work as a technician (which thereafter evolved to

that of a chemist) was that of a professional employee (excluded from the unit description), with specialized skills necessary for the performance of a job as a chemist. While the chemical analysis that she performs is crucial to the production process, there is no interchange between her and the other employees and she otherwise lacks a community of interest with the Unit employees. Accordingly, the objection to her ballot is sustained.

Paul Plonka, Stephen Iggens, and *Jason Rothwell* were all students working as part-time employees at the time of the election.

Plonka is currently employed as a systems analyst at ABQC. He was first employed by the Respondent on June 18, 1990 as a warehouse worker. His father was the initial president of ABQC. Plonka attended Marquette University between 1988 and May 1992 studying organizational management, skills he embraced in his current position with ABQC as a systems analyst. Plonka testified that during a particular period of time, he couldn't "give you exact times that I worked during that period." However, the Records for that period reflect that Plonka worked no hours during the week of January 7 — 12, 1991; no hours during the week of January 28 — 31, 1991; and again no hours during the week of February 4 — 9, 1991. Payroll records from December 1990 also show that he only worked 7 hours during the week of December 7, and 6 hours the following week.

While in school, Plonka received time out for spring breaks, time off for exams, and had a flexible schedule to accommodate school needs and other personal needs. If he wanted this same time off from his job he had to tell Supervisor Valente up to three days in advance, but when he didn't give three days notice and wanted time off for spring break, it still was approved. Plonka initially earned $5.50 an hour and was evaluated and received a

wage increase on August 6, 1991 retroactive to June 18 (three days prior to the NLRB election held on June 21). As a warehouse worker, Plonka's wage was increased to $6.57 an hour which was only three cents less than full-time leadpersons received.

Iggens was a part-time employee (personally recruited by them president Plonka) from June 18, 1990, through July 7, 1992. He was initially employed as a warehouse employee until the summer of 1991 when he became a dock leadman on July 1. He went back to the warehouse until March 1992 when he became a customer service assistant until the end of his employment on July 7, 1992. All through his employment, Iggens was enrolled as an accounting major at the University of Milwaukee. He initially earned an hourly rate of pay of $5.50 an hour until August 6, 1991 when he received a wage increase to $7.23 per hour retroactive to June 18 (three days before the election). His work schedule accommodated his academic schedule and while he had scheduled hours, he did not always work them. He sometimes stayed overtime and sometimes took leave of absence.

Rothwell was a part-time employee between May 1991 and May 1992 while a student initially at the University of Wisconsin Milwaukee and later at Waukesha County Technical College in Pewaukee, Wisconsin. He primarily did cleaning in all departments and was supervised by Keith Stanosz. His work schedule accommodated his academic schedule and he would take off for exams.

Although seasonal, casual or temporary employees may be considered not to have a substantial community of interest with other unit employees, regular, part-time employees are sometimes distinguished from the former category and considered to have sufficient interest in conditions of

employment to be eligible to vote. Here, although the three student-employees worked irregular work schedules, they were regular part-time employees when worked consistently over an extensive time period. Here, the parties entered into a pre-election stipulation that provides that: "regular part-time production and maintenance employees, including warehouse employees" are included in the bargaining unit. Under these circumstances, I find that Plonka, Iggens, and Rothwell are the employees the parties meant to be covered by this stipulation.

When the parties have entered into a pre-election stipulation concerning the composition of the bargaining unit, the agreement is controlling in determining employees' eligibility to vote in the election and, accordingly, I find that the Charging Party's challenge to their ballots must be overruled.

B. *The Mass Lay-off and Discharge of Certain Employees*

The principal issue in these proceedings is the matter of the lay-off/discharge of several employees. In a case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' Union or other protected, concerted activities were a motivating factor in the employer's decision to terminate or lay-off the employees. Here, the record shows that Respondent made a mass lay-off (except for three leadpersons) of all its first shift plating department employees, the department with the greatest number of Union activist, within hours of a group delivery by 30 employees of a petition demanding promised raises and vacations. The petition was rejected by president Petersen with a comment that the petition meant nothing to him and that he would do nothing until the Board ruled on pending election challenges and objections. These objections include

allegation of improper pre-election conduct, discussed below, which tend to show independent violations of the Act and are indicative of anti-union animus.

Most specifically, immediately after the mass lay-off, Respondent sent to each laid off employees a letter dated July 19, in which Petersen said he was discontinuing first shift operations because of a "series of very serious acts of misconduct including the drainage sabotage" until sure that the "risk of reoccurrence" was eliminated.

One of the other acts of misconduct mentioned was certain employees invading "my office" and making "demands regarding wages and vacations" and he added; "None of this is acceptable." He also offered a reward of $250 for information identifying the persons responsible and said such persons would be discharged and referred to the police for prosecution.

Under these circumstances, Petersen's letter clearly list the employees' demands regarding wages and vacations as one of the "acts of misconduct" that motivated his discontinuance of first shift plating. That concerted activity, principally by Union employees, was protected conduct and, as Petersen's letter admits, it was a consideration in Respondent's actions and it clearly is more than sufficient to establish the General Counsel's prima facie case regarding motivation.

Finally, the record as a whole supports a conclusion that Respondent's asserted justifications for its actions are pretextual (see the following discussion), and therefor also demonstrate unlawful motivation, see *Dorothy Shamrock Coal Company,* 279 NLRB 1298 (1986).

Under these circumstances, I find that General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's decision to layoff and delay the recall of all of its employees in the day shift plating department.

These factors establish anti-union animus on the part of the Respondent. Moreover, recognition of the timing of the layoff right after a concerted action and only a few weeks after the election, the protracted delay and irregularity in the recall process, and the pretextual defense, all combine to warrant a conclusion that the General Counsel has established a strong prima facie showing that union activity was a motivating factor in the Respondent's decision to layoff or otherwise discriminate against this group of employees. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. In light of the General Counsel's strong prima facie showing, the Respondent's burden here is substantial, see *Vemco, Inc.*, 304 NLRB No. 118 (1991). Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.[6]

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6. The Respondent also contends that no animus was specifically tied into the subsequent discharges of Proffitt and Mills (the suspects alleged to be responsible for the sabotage), however, Mills and Proffitt were two of the three principal spokesmen who presented the employees petition to management and, in any event,

(Cont'd)

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Respondent's defense is based upon its contention that it had a legitimate reason for its actions because of the egregious acts of sabotage committed by employees. It also defends its method of selecting employees for recall.

Here, I find that Respondent's actions after its initial response to the potential emergency type situation created by the apparently repeated acid drainage into basement storage tanks, and the reasons therefore, are generally implausible, inherently improbable, and uncorroborated by supportive evidence, and therefore clearly support an inference that they are pretextual.

First, the emergency clearly was over by the next day. The only preventative or investigative action taken by management was to bar all the day shift employees' (except leadmen) from returning. No public safety authorities were contacted by Respondent despite the alleged seriousness of the event. No police or investigative health or safety agency or private investigative service was notified or asked to find the specific cause of the drainage or to recommend corrective action. Three days after being locked out, the employees began informational picketing. Three days latter president Petersen sent these employees a letter saying that "due to current production levels in the Plating department" he was "unable" to bring back the entire work force and would fill only production required positions and then with the most qualified individuals.

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in circumstances involving a mass or group termination, there is no need that each individual be identified specifically as a known union activist for the General Counsel to substantiate his already strong showing that Respondent's overall action was discriminatorily motivated and that this discrimination affected everyone in the group, see the Board's discussion in the *Vemco,* case, *supra.*

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In fact, production remained essentially the same (except for one production item plated on one particular machine). But, rather than bring back any of the first shift, Respondent immediately and from July 19 forward, utilized the three leadpersons *and* the second shift plating department employees on modified hours, while requiring these employees to work as much as 4 hours overtime per day. Then, when employees were selectively recalled, they were not recalled based upon what machine they had been operating prior to the lockout, but returned under a new recall policy which purported to include "qualifications," "attitude" and "seniority if other factors are equal."

In fact, there is no showing that production demands or requirements underwent any substantive change on or after July 19th. Except for possibly one machine, there was no change in Respondent's basically stable plating production and Respondent's allusions to production demands as a reason to prolong the lay offs clearly is nothing more than an attempt at misdirection. There was not a legitimate reason and Respondent's attempt to portray it as such is pretextual and indicative that it is attempting to mask its true motivation.

When recalls began, Hispanic and Caucasian employees generally were recalled prior to Black employees (who generally were identifiable as Union supporters), despite the fact that they generally had more overall experience on a broad range of plating machines, more seniority, and had often helped train the newer employees who were recalled in their stead.

Other than being physically and verbally denied their admittance to work on the 19th, these employees received no written layoff notice, but were sent a letter dated July 19, saying

the company was discontinuing first shift operations because of "the drainage sabotage" until sure that the "risk of reoccurrence" was eliminated. This letter also offered a reward of $250 for information identifying the persons responsible and said such persons would be discharged and referred to the police for prosecution.

Employee David Roark responded to Respondent's request for information (admittedly in hopes of getting his job back), and gave an affidavit to the company on July 22 in which he said he saw Proffitt coming away from his work station, at 9:30 a.m. on July 18 and going by the area of the muriatic acid drain valve and saw Mills then join him at Proffitt's work station for a conversation.

Daniel Roark, David's cousin, gave an affidavit on July 29 that said Mills confronted his cousin David at the Union hall after they had been sent home on the 18th and that after David said the drainage was dangerous, Mills got mad and that later Proffitt and Mills were joking about now getting their vacations.

In contrast to Daniel's statements, however, David said nothing about Mill's getting mad either in his affidavit or in his testimony.

Mills and Proffitt were called in and questioned but each denied any involvement. Despite its statement in its letter to employees, Respondent did not refer the matter to the police. It did, however, suspend both "suspects" on July 27 and it then seized upon the speculative circumstances noted by the Roark cousins and thereafter sent letters of termination to both Mills and Proffitt, two of the three most vocal spokesmen who had presented wage and vacation demands to Petersen on July 18.

Under these circumstances, I conclude that the Respondent has failed to show that it conducted any meaningful investigation or had any valid basis other than rank speculation (Roark's circumstantial placing of Mills and Proffitt away from their work stations is at 9:30 a.m., when it appear the acid drainage occurred later, after the Union's presentation of the petition to management, when 30 or so employees were away from their work stations), that would warrant the discharge of both Mills and Proffitt and I further conclude that Respondent's specific discharge of these two employees is shown to have been motivated by their Union activities and to be in violation of Section 8(a)(1) and (3) of the Act, as alleged.

While Respondent was in the process of terminating Mills and Proffitt, it recalled both David and Daniel Roark on July 29, shortly after they gave affidavits. Respondent told David that he would be recalled after they got a part for "his" machine and he was then brought back to operate the same machine he had been operating (he subsequently transferred to another department at a slight increase in pay).

No evidence was presented to indicate that Respondent installed locks on valves or took any other security measures (other than failing to recall many employees) that would protect the acid tanks from unauthorized drainage and therefore eliminate the "risk of reoccurrence" that it was said to be so concerned about.

In addition to the three lead persons, those from the second shift and the recall of the Roark cousins, Respondent also recalled Henry Burrows, Ronald Erdman, Chris Johnson and Eric Kamauga on July 29. Vincinte Lepe, Francisco Sigala and Maria-Carmen Olea were all recalled on August 1 or 3 even though the

latter three, and Johnson, had the least amount of seniority and experience, having each been an employee only since mid-May, a little over 2 months (Kamauga, an inspector, and Burrows were black employees). On July 18 there had been 23 day shift plating department employees including the three lead persons. As of August 26 only 9 of 20 had been recalled.

Black employee Jasper Hicks, who had worn Union buttons during the campaign and was a member of the organizing committee, was among those laid off. Hicks left work with his supervisor's permission immediately after the petition was presented and was not there when the acid drainage occurred nor was he there to be sent home with its other employees. Despite his absence when the "sabotage" occurred, he was denied admission the next day and was not recalled until December 3, after he successfully passed a drug screening.

Under all of these circumstances, and especially in view of Respondents consistent production requirement, its scheme to cover these needs with changed hours for second shift employees,[7] use of lead persons, limited recall, and extensive overtime, and its inconsistent recall procedures that appeared to often disregard experience and otherwise often appeared to omit Blacks who were Union sympathizers, I conclude that the Respondent has failed to show that its lockout of an entire shift of workers and its subsequent delayed and selective recall of employees, was dictated by legitimate business reasons. I further find that the various proffered reasons for its extreme reactions to the act of sabotage are pretextual and do not rebut the General Counsel's showing that its actions were motivated by the

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7. I find that supervisor Stanosz testimony that no changes occurred is not creditable and is contrary to the weight of the evidence.

employees' Union activities, especially the presentation of a petition demand for promised wage increases and vacation which occurred just prior to the layoff. Here, Respondent seized upon a seemingly legitimate excuse to purge the plant of the most significant body of union supporters, and, accordingly, I find that the Respondent's mass layoff and prolonged or delayed failure to promptly recall these employees is shown to have violated Section 8(a)(1) and (3) of the Act as alleged.

This conclusion is reinforced by Respondent's related and contemporaneous discriminating treatment of employees Mills and Proffitt, discussed above, as well as its similar actions in requiring a drug test before recall and its discharge of Union activist Lisa Nixon when she allegedly failed that test after finally being recalled in late October.

Nixon, like Mills and Proffitt was black, a long-term employee, a member of the Union organizing committee, a principal spokesman at the presentation of the wage and vacation demand petition just prior to the mass layoff, and one who engaged in subsequent picketing of Respondent's facility. On November 7, about a week after being recalled and tested, she telephoned the Company and was told by Petersen that her drug test showed positive and that she could not work at ABQC. Nixon told Petersen that positive results were "impossible" and that she was not a drug user. She asked Petersen to provide her with a written copy of the drug test results, having previously been told at the doctor's office she could get a copy from the Employer. Petersen said he did not have a copy. Nixon asked what kind of drugs were alleged and Petersen said he did not know but later that day was told the drug was cocaine. Nixon again protested that she was not a drug user but despite her request, she was never provided a copy.

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Respondent acknowledges that Nixon was terminated effective November 7. Her "assignment" form, from Respondent's personnel records, is checked as "project completed" rather than showing her "terminated" or with any other reason and it otherwise is marked affirmatively as "Eligible for Rehire." A copy of her drug test was not in her file and a copy offered into evidence as Respondent's Exhibit No. 12 was objected to by the General Counsel following Petersen's testimony regarding a phone conversation in which he said the Doctor told him the test was positive for cocaine. I affirm my ruling that this testimony is admissible (it is not hearsay but is a verbal action which is the asserted informational basis for Petersen's further actions in affecting Nixon's termination and it is not for the truth of test result). I also accept the General Counsel's request to withdraw his objection and his related motion to receive Respondent Exhibit No. 12 and it is hereby received into evidence.

No explanation was given as to why the test report was not given to Nixon or why it was not in her file. The test, however, on its face states that the reason was for "pre-employment" and that the collection date was "November 18." The results (positive, cocaine), were dated "November 27."

Here, the physical test report is inconsistent with the date of the actual "collection" and cast into doubt the validity of Petersen's phone receipt of the test results on or about November 7 and, lend credence to Nixon's consistent denial of drug involvement. Respondent's entries on her personnel records also are inconsistent and, in the light of the overall strong showing of motivation against Nixon and others because of union activities, support an inference that Respondent has relied upon pretextual reasons in its apparent desire to avoid recalling a strong Union

supporter. Moreover, I find that Respondent's assertion that Nixon was denied recall under its drug policy also is pretextual.

The company's asserted drug policy states:

> The company reserves the right to request an Alcohol/Drug screening prior to employment or after being laid off for a substantial period of time.

Although there was testimony adduced that indicates that the Respondent did not consistently strictly embrace this policy,[8] the record here shows that Nixon would not have been laid off for a "substantial" period were it not for the Respondent's intervening illegal acts in first laying off the entire first shift plating and then failing to timely recall employees from layoff for discriminatory reasons. In this connection it is noted that Nixon, in particular, was shown to have been an experienced, cross trained employee capable of operating almost all of the department's machines. Otherwise Respondent has shown no persuasive or valid reason why she was not recalled until late October or why less experience, less senior employees were recalled ahead of her in July and August (when no additional drug test were given). Inasmuch as the Respondent's use of an additional drug test is not based upon a valid layoff for a substantial period, it cannot be the basis of a valid reason for termination. Therefore, for both of the reasons discussed above, I conclude that Nixon's termination is not shown to be founded on valid business reason but was

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8. For example, several of the Hispanic employees who were hired in May, just prior to the establishment of the voter eligibility list, began work prior to the results being received while most previous job applicants had to wait for the results before starting.

motivated and caused by her and the other employees involvement in Union activities and I find that Nixon's termination is shown to have violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

C. *Alleged Pre-election Violations of Section 8(a)(1)*

On April 19, the day after Respondent declined to recognize of the Union, Petersen met with all employees and announced that, for an indefinite period, they were being transferred to Staff Right's payroll (instead of ABQC's payroll), due to "cash flow" problems. Petersen testified he was not sure of the date he met with the employees regarding this payroll transfer matter and guessed "between April 7 and 12," or somewhere in that area. Several employees testifying estimated the date as being approximately one week after April 12, or specifically on or about April 19 and I credit that specific testimony (a letter from Staff Right to Respondent, agreeing to the proposal, is undated). The announcement made employees very upset, very scared because they felt that they were now "temporary" employees of Staff Right again instead of having the "permanent" status attained with ABQC. As "temporary" employees, a status most had previously held with Staff Right when first hired, they felt they no longer possessed job security of protection and as temporary employees, they felt they could not get car or other loans with pay checks from a temporary service.

Despite the fact that Respondent contemporaneously executed the purchase of another company, it presented evidence that it did have a cash flow problem that was alleviated by its temporary use of Staff Right's payroll services. This issue, however, does not depend upon a motivation — business reason criteria for its resolution.

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The question is whether this action (i.e. a taking away of permanent employee tenure status and reversion to status as only a temporary employee), had a reasonable tendency to be viewed as a reduction in benefits or a scare tactic that has an influence and effect upon employees that interferes with their rights under Section 7 of the Act. Here, Respondent's action was taken contemporaneously with its rejection of the Union's recognition demands and it was not accompanied by any verbal or written assurances that the employees tenure or status as permanent employees would not be affected by the action. Otherwise, Respondent made no effort to repudiate the unlawful impression that was conveyed to the employees. Accordingly, I find that the announcement and action in this regard interfered with the employees' Section 7 Rights and violated Section 8(a)(1) of the Act, as alleged.

Shortly after the payroll change announcement, Supervisor Keith Stanosz had a conversation with several warehouse employees in their work area. Robert Nixon, Calvin Jones and Timothy Mays confirmed that in the conversation, Mays asked Stanosz why the ABQC employees were switched to the Staff Right payroll? and Stanosz answered that "they was trying to scare us off of the Union" or that it was "just to scare us." He also said that "as a matter of fact we don't need no Union" and then asked who was behind or who was trying to form the Union. When asked by Respondent's counsel if he recalled any of this conversation, "where you discussed the reason for transfer of the employees to Staff Right?" Stanosz replied: "I had so many people ask me questions about it, I don't remember specific things." He then was asked: "Do you recall whether or not you ever told them that the purpose was to scare off the union?". He answered, "No, I never told anybody." Inasmuch as Stanosz had no recall of the conversation, I find the corroborative testimony

of the three employees to be more convincing than the bare denial Stanosz made in response to Respondent's leading question and I credit their testimony in this respect.

These remarks by Stanosz, at the start of the Union campaign, were made under a totality of circumstances that underscores the threat implied in the employees' perceived demotion in status from regular to temporary employee and the accompanying interrogation has the necessary indicia to show coercion. Accordingly, I find that Supervisor Stanosz's remarks are shown to have violated Section 8(a)(1) of the Act in each of these respects, as alleged, compare *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985).

In late April Mills, Proffitt and Nixon spoke for a group of 20 or more employees where they presented a letter to Petersen asking for recognition and demanding a meeting to discuss what was happening. Petersen responded that the petition meant nothing to him and that he didn't recognize the Union. Respondent thereafter executed an admitted 'game plan' to resist the union organizing attempt which plan included the hiring of labor counsel, letters mailed directly to employees, and speeches to employees once and sometimes twice weekly.

After one speech (between May 13 and 27), Stanosz spoke to Sonny Anderson in a manner suggesting interrogation, a matter not alleged in the Complaint. General Counsel asked that it be embraced within his Motion to conform the pleadings to the record, however, I find that any consideration of this suggested interrogation would be needlessly duplicative and cumulative and therefore I find it unnecessary to rule on this matter as an alleged violation of Section 8(a)(1).

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Former employee Dale Wiegert testified regarding several conversations with Staff Right owner James Lazear alleging that he made several remarks alluding to anti "Union" type remarks attributable to its employee hiring relationship with the ABQC. Lazear's testimony contradicted Wiegert. Wiegert, went out of his way to tell Respondent he had voted "against" the Union and he quit shortly after the election. Otherwise, he gave inconsistent and highly improbable testimony. Lazear's testimony and my evaluation of Wiegert's overall testimony and demeanor tend to show a degree of instability and unreliability on Wiegert's part that shows his testimony to be unreliable and unpersuasive. Accordingly, I can not find that anything he said is entitled to any persuasive weight and therefore it does not support any allegations of unfair labor practices.

Terrance Schuster, was a self described "management labor lawyer" retains by Respondent ABQC in conjunction with the union organizational campaign. Although he generally denied having "interrogated" employees Robert Person and Keith Mills, the overall evidence clearly and strongly suggests otherwise. Schuster testified that he walked around on the plant floor "four or five times" prior to the June 21 election and said he "may have told employees that the Union was not in his/her best interests and that it "is a possibility" that he told employees "things will get better at the plant." He was involved in helping with the writing of the speeches given to employees and he was with Petersen when employees were told management was against representation by the Union. He also admitted that he did speak to Mills and Robert Person during worktime on the shop floor. He reluctantly admitted that "it is possible" that it was he who had approached them and he agreed that he talked about basketball and "may have" told them he used to work in a plant like the Respondent. Robert Person testified that approximately 2 weeks prior to the

June 21 election, Schuster approached him at his work station and:

> A He asked me how did I feel about the union. And I told him I feel that we needed one because the company said one thing and do another thing. And he told me that would get better, and he walked away.
>
> Q Do you recall him saying anything else?
>
> A No, he say he used to work in a place like this and things would get better, and he walked away.

Mills testified that in early June, Schuster also approached him in the plating department asking if he still felt the same way about the Union? Mills replied he still supported the Union and was not going to change his mind. Schuster then allegedly replied that if there was a union at ABQC, "your wages will go down" and began talking to Mills about basketball. The latter statement was not alleged as a violation in the complaint and I find it unnecessary to rule whether this is a violation of the Act for the reasons previously noted above.

Person was not known at that early time as an open and active Union supporter and I find that the totality of the circumstances regarding his interrogation are coercive and are shown to have interfered with his Section 7 rights in violation of Section 8(a)(1) of the Act, as alleged, see *Sunnyvale Medical, supra.* Mills, however was an open and active supporter and, as I find it improbable that Schuster actually made any additional comment about wages going down, I am not persuaded that the

circumstances surrounding the question to Mills support a conclusion that Respondent violated the Act.

A number of other alleged pre-election acts of interrogation also were alleged to have been made by president Petersen and supervisors Stanosz and Cheryl Valente. Jeffrey Heppe, a former employee, testified that he and several other warehouse employees were approached by warehouse supervisor Valente on about June 19, in Glearon Scott's work area, and that Valente ". . . asked us if we were voting yes for the Union . . ." He further testified Valente stated that, ". . . if the Union got in that she would have to rework our jobs, that we'd have no more free time and she'd have to write us up for every little thing." Additionally, ". . . she said she would have to add extra job duties . . . to make up for our free time that we had," and that if the Union got in they would have to stay at their work stations during worktime. Heppe also testified that she frequently asked, him what he was going to do (about the Union). Employees Scott and Steve Grady each testified in a similar fashion and confirmed the thrust of the conversations. Valente testified that she had followed the instructions from the company attorney that she could not ask employees how they felt about the union. She said Scott called her over and asked her why she didn't like the union. She told him and continued an exchange with other employees as they came back from a break and joined in the conversation.

Valente's testimony minimizes the nature of her part in the conversation and Respondent contends that it was a "casual expectable conversation between a supervisor and employees who work closely together and therefore acceptable as similar to that involved in *Sunnyvale, supra.* Here, however, I find credible testimony that Valente's retorts went beyond casual remarks and on several occasions alluded to the imposition of more restrictive

working conditions if the Union was selected. Moreover, Valente engaged not only in this one conversation but had repeatedly made earlier inquiries regarding the Union. Accordingly, in the context of her continuous and repetitions pursuit of the subject and the implicitly threatening nature of her responses about more restrictive working conditions, I find that the totality of the circumstances were coercive and I conclude that the conversation interfered with its employee rights and violate Section 8(a)(1) of the Act with respect to both her interrogation and threats, as alleged.

Employee Jasper Hicks, who admittedly wore a Union button, testified that during the first week in June, Respondent's president spoke to him at his work station and that:

> A We . . . were just talking about the union and [Petersen] asked me what I think about it and how I felt about it . . . so I told him that . . . it would help us get more money and better benefits . . . and . . . he said that they felt they were treating the employees fairly, so he really didn't think that we needed the union in there.
>
> Q Okay. And did he raise the subject of the union in this conversation.
>
> A Yes.

This action by Respondent was not part of the allegations in the complaint in this case and I will deny the General Counsel's Motion to amend to cover this situation inasmuch as it involves a cumulative allegation. I note, however, that the interrogation

took place at Hicks work station and was made by the company president, circumstance that tends to show coercion and, otherwise, it shows that the Respondent, at the highest level of management, was willing to walk and cross the edge of the line between casual and coercive conversation in order to attempt to influence the forthcoming election. The fact that the company president and legal counsel engaged in such behavior makes it that much more plausible that supervisors Valente and Stanosz bluntly questioned employees about why they wanted a union.

Mills testified that about a week or so before the June 21 election, Supervisor Stanosz approached him in the "roto finish" work area, saying:

> "What do you want a fucking union in here for anyway? It's not going to help you at all." And I said, "Well, it is going to help me, you know, help me, you know, get me a raise and stuff like that." And then he said, "You're lying, Chuck. You're a liar, Chuck," or something of that matter, and then he turned around and started walking away.

Employee Virginia Boyde testified that while working on first shift in the plating department a week or two prior to the June 21 election, she developed painful cramps and went outside for fresh air, helped by fellow employee Lisa Nixon, Stanosz approached them and after ascertaining what the problem was, asked if he could ask them a question. Nixon testified, "that he asked were we for the [U]nion and what we [thought] about the [U]nion." When they answered, He said, "why?" They answered: "for respect . . . because of the favoritism that was going on, because we did not have job security, because of pay, wages, . . . no good health insurance . . . because the company was not fair."

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Matthew Emer signed and was involved in the late March-early April circulation of the petition of union interest. He saw Stanosz with the petition in his possession and in a position to see the names thereon. He signed a union card on April 12, he attended union meetings and he signed at least one distributed union handbill.

On about June 18, Emer, who was a machine maintenance mechanic under the supervision of a supervisor other than Stanosz, received a warning for his attendance. Emer testified that on the same day, as he was leaving the plating department, Stanosz stopped him and "asked me if I realized how strict the attendance policy would be if we got a union in there, that [ABQC would] go to the letter." Stanosz was not asked about this conversation when he was called as Respondent's witness. Emer, however, was questioned on this point on cross-examination by the Respondent and the General Counsel ask that it be embraced in his Motion to amend the pleadings and found to be a violation of the Act.

Stanosz admits that he questioned the two women but only to the extent that he asked them if they thought "he" was unfair to workers as alleged against the company in a Union leaflet that had been circulated earlier that day and Respondent urges that it was just a casual conversation, however, I find that Stanosz went beyond the bound of casual conversation and I conclude that the timing of the interrogation of two members of the Union committee shortly after the Union had distributed a leaflet on the subject of his questions had an inherent coercive effect that would tend to interfere with their expression of similar positions and of I find it violated Section 8(a)(1) of the Act as alleged.

With respect to Stanosz's attendance remarks to Emer

(which stand unrebutted), I find that they were coercive and threatening in that they were made by the supervisor of another department (where Emer went to work on machines), who had apparent knowledge that Emer's own supervisor had disciplined him for attendance and were made only 2 or 3 days prior to the election and on the same day that he had received the warning. Accordingly, I find that this threat of a more severe working condition if the Union was selected violates Section 8(a)(1) of the Act and I accept the General Counsel's Motion to Amend the Complaint in this regard.

The General Counsel ask that a statement by supervisor Valente also be considered a threat. The alleged remark (not alleged in the Complaint), was to the effect that the Company "could" (not would), drag their feet on contract negotiation and was in response to a question from an employee. Under these circumstances, I am not persuaded that it would constitute a violation of the Act and I find it unnecessary to consider it as part of the Complaint.

Finally, on June 17, just 4 days before the election, Petersen told employees that there wasn't a cash flow problem any more, but that because of the [NLRB] election, everything was tied up . . . that they couldn't give out any raises (or vacations), now because the election was pending . . . and that they would get the raises and paid vacations "down the road." Prior to July, Respondent did not grant raises, merit wage reviews or paid vacations to any bargaining unit employee.

Witnesses for the General Counsel consistently testified that when they were hired they were told that they would get or be eligible for raises and vacations after one year, a generalized fact not disputed by Respondent. Respondent argues that it is the

question of whether there was a promise or a guarantee that is at issue, and that was Petersen's constant position that neither he nor his predecessor ever "promised" employees one week of paid vacation after a year but that they indicated it was "likely" that there would be raises and vacations tied into one year of service.

It is well settled that an employer in the midst of a union organizing campaign is required to proceed as it would have done had an organizing campaign not been in progress. See *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975) and *The Gates Rubber Company*, 182 NLRB 95 (1970). Here, Respondent is shown to have told new employees that they would get or be eligible for raises and vacations after a years service. Not only did it fail to attempt to implement its asserted policy when requested to do so by the employees but it affirmatively put the granting of these expected benefits on indefinite hold specifically because employees were seeking Union representation. I find that this delay is unreasonable and that it constitutes an action that interfered with employee Section 7 rights to freely choose a bargaining representative. Accordingly, I find that its conduct in asserting an indefinite delay in implementing its plan violated Section 8(a)(1) of the Act, as alleged, see the *Russell Stover* case, *supra*.

D. *Objections*

In view of the above findings of violations, I also find that to the extent they parallel the Union's Objections such Objections are sustained. Those Objections not otherwise discussed and sustained below are considered not to have been proven and are overruled.

Objection 10 — This objecting alleges that the Company

failed to timely post the election notice and is based upon employee Mills testimony that he didn't see one in the plating department until the day before the election. Ruth Zinns credibly testified that she posted three of the notices including one in plating, about one week before the election and that she read and followed the instructions from the Board as to the posting requirements. When one notice became defaced in the cafeteria about two days before the election, she took it down and probably replaced it.

The record has no corroborative support for Mill's apparent failure to observe the notice in the plating department until the day before the election and as there is no claim that anyone failed to get notice of the election or that anyone else observed anything that would contradict Zinns' recollection, I find that the objection should be overruled.

Objections 14 and 17 — These objections relate to alleged anti-union statements by Staff Right's half owner Jim Lazear particularly to Dale Weigert prior to his employment. Lazear testified that he had never received any instructions to screen applicants for their union beliefs either before or after the organizational campaign had begun but that once the campaign began, he informed applicants that there was such a campaign in progress and what it entailed in order that they would make an informed decision as to whether they wanted to be employed.

Lazear also denied any further discussion with Weigert or others about the union. As noted above, Weigert's demeanor and overall testimony was not reliable or persuasive. I credit Lazear's testimony and I therefore find that there is no credible or persuasive support for these objections and they are overruled. To the extent that the General Counsel's Motion to Amend the

Complaint to include these events as alleged violations, I further find that the record contains insufficient probative evidence to substantiate his claim.

Objections 16 and 18 — These objections contend that the Excelsior list was incorrect and was intentionally "stacked" by Respondent to include supervisors etc., and by its sudden hiring of eight employee immediately prior to the May 11 cut off date. The Respondent did attempt to include employees Habel, Zinns, Strupinsky and Mintz in the unit, despite their lack of a community of interest, as found above.

Francisco Sigala credibly testified that he, Maria Olea and Vincente Lepe all completed their employment applications and took the urine tests at Staff Right on Friday (May 10). Weigert said he applied May 9 or 10 and Respondent's records show that he started on the 10th, Lepe also the 10th, and Francisco Sigala and Olea on the 11th a Saturday, however, Sigala testified that he did not start work until Monday May 13, two days after the May 11, cut-off date for eligibility. Chris Johnson also was hired on the 10th (as were two others who did not stay and were not on the Excelsior list) and all were hired for the plating department. Respondent's records show that 12 of 19 hired for that department prior to May 10 had started on Monday (or a Tuesday after a holiday), 3 had started on a Friday and none on a Saturday. Moreover, several employees testified that they had not been allowed to start until they had taken and received the drug test results. The several Hispanic employees testified that they were given the drug test at the office at Staff Right right after they applied. Francisco Sigala said he took the test on Friday but didn't start until the next Monday (May 13). Cruz said he started May 10 the same day he applied and that he took the drug test 4 hours before starting (on the second shift) but wasn't told it was ok until his second day.

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The Charging Party also made an offer of proof that two of the employees hired May 10 or 11 (Chris Johnson and Mike Cintron), neither of whom was called to testify, told Mills that when they were hired by Staff Right they had to say they were against the Union. The Charging Party ask that I reconsider my ruling rejecting this proffered testimony, however, I find it to be unreliable hearsay and I affirm my prior ruling.

I find that the circumstances surrounding the objections indicate a high probability that both the naming of ineligible employees to the Excelsior list and the precipitous hiring of several employees thought likely to be against the Union (other testimony indicated a supposition that the Hispanic employees were less likely to favor the Union in this company setting) had the effect of interfering with the fairness of the election. Although foreman Stanosz made some oblique references to overtime and inventory and a need to create sales and to run more machines at the general period of time prior to the election on June 21 and of his talking to Petersen about one solution was to hire more people, there was no showing of any specific probative business reason why eight persons were hired May 10 and 11 and why they were hired in a manner inconsistent with general past practices. Under these circumstances I find that the objections should be sustained.

Objection 21 — A day or two before the election, Mills posted a leaflet which read, "Things work best when you vote Union yes." President Petersen came up to Mills at his work station and told him to take it down even though employee Jacinto Torres had a sign with the middle finger sticking up which said Vote No! Torres' sign, obviously anti-union literature, had been posted for two weeks and I find that Petersen's conduct was discriminatory and sustain the objection.

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E. *Alleged Post-Election Violations*

As noted, several of the earliest hired employees testified how they had been told that they could expect wage increases. Petersen himself testified:

> I said, you know, after a year rolls by, I am sure that we would have a benefit package in the form of vacations and some sort of wage increase. And I said as the company grew, that they would grow with us. That is what I told them, I believe it was September or October of 1990. And I never made no promises to them at that point. That is exactly what I told them.

Then, during Petersen's meeting with employees on June 17, he told employees there wasn't a cash flow problem any more, but that because of the election, everything was tied up . . . that they couldn't give out any raises now because the election was pending . . . and employees that they would get the raises and paid vacations "down the road." Accordingly, and for the reasons discussed above regarding Respondent pre-election threats to withhold these same benefits because of the pending election, Respondent's actions after the election, while objections to the election were in litigation, also constitute a violation of Section 8(a)(1) of the Act, as alleged, see the *Russell Stover* case, *supra.*

Next, Petersen sent a letter, dated July 27, to all employees stating:

> The company at this time has decided to grant all eligible employees with 1 year's seniority the following:

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A. 1 week's (5 days) vacation with pay.

B. Merit wage review.

Respondent stipulates that any and all changes made with respect to the employees' wages, hours and working conditions from April 18 to date were made unilaterally and without prior notice to, or bargaining with, the Union. The General Counsel argues that the benefits were granted in order to dissuade union support and activity and that in view of the timing of this action it also violates Section 8(a)(3) of the Act (on this same date Respondent suspended leading Union activists Mills and Proffitt and shortly thereafter recalling six less senior and less experiences employees who were not members of the organizing committee).

While at first glance it may seem inapposite to conclude that Respondent could violate the Act first by failing to grant wage and vacation benefits and then again violate the Act by granting these same benefits, the two clearly are related and each reinforces the other. Except for the passage of several weeks, there is no intervening event to explain Respondent's change in policy (the election objections still pending before the Board), except for Respondent's intervening purge of many of the Union's strongest supporters in the mass layoff of the day-shift plating department.

As cited by the General Counsel, the Court in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); stated:

> .... The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of

> benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Here, the sudden granting of benefits after they first were withheld, assertedly because of pending Board matters, under circumstances where the company had just made a mass layoff of an entire department shift with strong union backing and had also suspended two of the leading Union spokesmen, sends a clear message that the company controls the source of benefits and that employees who try to influence its action through Union activities will have difficulties in keeping their jobs. This message clearly interferes with employee Section 7 Rights and Respondent's actions in both of these respects violates Section 8(a)(1) of the Act, as alleged.

As noted above, the Respondent stipulated that all changes made in wages and working conditions after April 18, were unilaterally made without notice to, or bargaining with, the Union. Most of the unilateral changes can be found in Respondent's first-ever employee handbook which issued in early September and which reflects changes[9] made then and since

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9. 1. New "Sexual Harrassment" policy subjecting employees to immediate discharge.

2. "Hours of Work": changed first and second shift hours, a change in second shift from 3 p.m. — 11 p.m. to 9 p.m. — 7 a.m.

3. "Job Descriptions": never existed before.

4. "Layoff and Recall After Layoff": Never existed before. Uses "attitude" as element in determining layoffs and recalls.

(Cont'd)

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April 18. The changes under the wage structure, for example, show a per hour change for a warehouse material handler from base — $6.25, top — $7.60, to base — $6.40, mid-range — $6.70, and top — $8.00.

Under all the circumstances, and in view of the Union's majority status, as further discussed below, I find that the Respondent has violated Section 8(a)(5) and (1) by making these unilateral changes, and I further find that these changes also effectively discouraged and undermined the employees' support of the Union in violation of Section 8(a)(3) and (1) of the Act, as alleged.

(Cont'd)

5. "Call-In Pay; Report Pay; and Outside Employment" policies: Never existed before.

6. "Solicitations and Distribution": Never existed before.

7. "Paid Time Off": Never existed before. Note first reference to 1 week of paid vacation after 1 year. The additional weeks and days of paid vacation were all given after the July 27 1 week of paid vacation.

8. "Holidays": Added four additional yearly holidays.

9. "Seniority": Never had a formalized seniority system before, including no prior reasons as basis for losing seniority.

10. "Discipline": Never had formal progressive disciplinary system before.

11. "Alcohol and Drugs": New; including the broadened right of Respondent to require "blood or other tests to determine compliance with [its] alcohol and drug policy."

12. "Wage Structure."

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F. *Sonny Anderson's Discharge*

Sonny Anderson was an articulate supporter of the Union, however, he was not a recognized leader or a significant spokesman for the employees to the same degree as were Mills, Proffitt and Nixon. He was considered to be a good workers on first shift plating, however, he was not recalled until December 5 after the July layoff. He received a 36-cent-an-hour raise in February 1992 but learned another employed doing the same work had been given a 51-cent-an-hour raise. Anderson canvassed other Black and non-Black first shift plating department employees concerning the amounts of their raises and formed the opinion that the raises of the Black employees were uniformly lower than those of the non-Black employees.

Anderson went to Stanosz' office and testified that:

> I told him that I didn't feel it was fair, I got treated fairly on the raise he gave me, and then it seemed in general that the black employees were given less in raises than anyone else of non black employees. Keith just told me, no comment. That's the way it is.

Anderson then went to president Adikes office (Stanosz also was present), and testified that:

> I told Bob Adikes that I felt that I was being treated unfairly with the raise that I got, and that — I told him it seems like black employees were treated unfairly when it came to raises and different positions such as lead persons. And then Bob Adikes said that other

> people's business isn't my business and that he only wanted to hear my business. And so I told him that I can't help it to help other employees, because it was down in me to do that, especially my brothers and sisters. I said because they are flesh in my flesh, and bone in my bone. Their hurt is my hurt. Because when the same conditions situation at ABQC.

In April Stanosz stopped to question Anderson as to why his machine was running empty. Anderson responded by asking why he was questioned and a white employee was not; Anderson testified that:

> Keith said what are you talking about. And then I told him that what was the difference between me and Robert and Chris. And then he said, I told him by him acting this way, treating people different because of their race that he was acting like the devil. And he walked over to me real fast.

Stanosz then told Anderson, ". . . young man, you don't call me a devil." Anderson then told Stanosz that if he would stop acting like a devil, he would not call him one. At the end of the shift, Stanosz told Anderson Adikes wanted to see him. All three met and Adikes asked Anderson to explain what had occurred and Anderson said he called Stanosz a devil ". . . because he is treating the [B]lack employees differently," ". . . acting like a devil toward us[B]lack employees." Stanosz warned Anderson that he would fire him for insubordination if he called Stanosz a devil again and Anderson said he would not do it again.

In mid-May, Anderson canvassed all of the Black employees

and women in the first shift plating after a white employee who worked in the first shift plating department was given a better paying job. Anderson went to Stanosz, explained he had talked to all of the other Black and female employees discovering they did not ever know the job was available, and that he did not think it was fair to the Black and female employees. Anderson also complained to Adikes, who said he thought the position had been posted.

On July 20 Stanosz changed Anderson's machine assignment because the machine was down, and assigned him to the phosphate machine. Shortly thereafter Stanosz observed supervisor Habel remonstrating face to face with Anderson for not having timely relieved the operator on the phosphate machine. Stanosz then took over the conversation and told Anderson that he knew what job he was to do and that the operator needed relief. Anderson also told Stanosz that he thought it was unfair for Stanosz to "move us employees around." Stanosz told Anderson that he could leave "if he didn't like it," Anderson did just that. As he was leaving, Stanosz told him he should think about it, but Anderson left at about 7:15 a.m.

Shortly after 9 a.m., Anderson called President Adikes, asking if he had been made aware of the incident. Adikes said he had heard about some of it but had not had a chance to investigate as yet. Anderson then explained that ". . . because of Keith moving us around, us employees that it upset me."

The next morning, after receiving approval from Adikes, Stanosz discharged Anderson, telling him he couldn't get in anybodies face and couldn't just walk off. Anderson specifically testified that:

> He said he couldn't tolerate me getting into supervisor's faces when I would go off on them. And then he also said that if I wouldn't had gotten into Al Habel's face, he wouldn't have fired me.

Here, I agree with Respondent that Anderson's Union activities had nothing to do with his discharge. However, although it also appears much of his protecting was directed at his personal situation, I also find that it has "some relation to group action in the interest of employees" and therefore it was protected concerted activity, see *Circle K Corporation,* 305 NLRB No. 139 (1991).

Anderson's discharge, however, did not follow directly from his protest to management but was occasioned by his subsequent confrontation with a supervisor. Accordingly, an analysis is required under *Wright Line, supra,* to see if Respondent's evidence shows that Anderson would have been discharged in the absence of his protected concerted activity.

Here, I find that there is no timeliness or valid nexus between Anderson's earlier complaints to management and his statement to Stanosz that "it was unfair of him to move us employees around" at the time Stanosz spoke to him after seeing his face to face remonstration with supervisor Habel about his apparent failure to promptly report to his new assignment. Anderson himself testified that Stanosz said:

> Even though I had bad attendance record, he still would have kept me as an employee, but he couldn't tolerate me getting into supervisor's face. And that's the truth.

Under these circumstances, I am persuaded that Anderson's July discharge rested solely on his imprudent and insubordinate conduct. This behavior conflicts with an employer's right to otherwise maintain order and respect in the work place. I am not persuaded that the showing that Stanosz himself had a face to face argument with employee Person in March 1991 (without imposing discipline), is a pertinent or controlling showing of disparate treatment and I conclude that the Respondent has shown that it had a legitimate, non pretextual reason for Anderson's discharge and would have taken the same action regardless of his prior concerted activity. Accordingly, I cannot find that the Respondent violated the Act in this respect, as alleged.

G. *The Bargaining Unit and Majority Status*

The Complaint alleges that an appropriate unit consists of:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

I find this to be an appropriate unit and that four persons who's ballots were successfully challenged (Habel, Nimtz, Zinns and Strupinsky) should not be included in the unit. As of April 18, 34 of 62 (see General Counsel's Exhibit No. 6 a) bargaining unit employees signed valid authorization/membership cards and subsequently, as of June 21, the election day, it had obtained 10

additional cards, while Respondent's employees never exceeded 88 during this period. Accordingly, I find that the Union had majority status on and after April 18, 1991.

H. *Refusal to Recognize or Bargain and Request for a Bargaining Order*

The Respondent received a letter from the Union noting majority status and demanding bargaining on April 18. The Respondent refused to recognize the Union and, as discussed above, made unilateral changes in wages, benefits and working conditions without first bargaining with the Union and, in view of its failure to demonstrate valid majority status free of disqualifying conduct, in the election that was conducted on June 21, I find that the record shows that Respondent's conduct in this respect is in violation of Section 8(a)(3) and (5) of the Act, as alleged.

Under the holding of the Court in *NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575 (1969), a bargaining order is an appropriate remedy for violations of Section 8(a)(1) of the Act, where it is shown that a union obtained signed authorization cards from a majority of the employees in an appropriate unit, and, after the union had attained majority status, the employer undermined the union majority status and made the likelihood of a fair election impossible.

In consideration of the nature and extent of Respondent's unfair labor practices discussed above, it is concluded that the General Counsel has shown that Respondent's illegal mass layoff of a major pro-Union department of the bargaining unit under pretextual and discriminatory circumstances, as well as other illegal acts, as found above, constitute a valid basis for the imposition of a bargaining order.

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As noted in the discussion of Union Objection No. 18, the Respondent precipitously hired eight persons the day before or on the May 11 cutoff date under circumstances that clearly interfered with the fairness of the election and had a probable effect in dissipating the Union's majority. The mass layoff in the day shift plating department resulted not only in discriminatory delays in recall of those who most likely to have been union supporters but also resulted in some other turnover in the unit that has a clear causal connection with that specific unfair labor practice. The Respondent was involved in other unfair labor practices and objectional conduct surrounding the election which also undermined the Union's majority. These actions have a continuing effect on employees that would foreclose the possibility of a fair election should a second election be held in the near future.

In conclusion, I find that these factors demonstrate conduct which is so serious and substantial in effect that a fair election untainted by the undermining impact of Respondent's discriminatory conduct would be unlikely. No mitigating circumstances are shown that would indicated that a fair election is possible and I conclude that it is necessary and appropriate to grant a bargaining order because, given the gravity of Respondent's misconduct, the Union's card majority provides the more reliable test of employees' desires than a contested election. Accordingly, I find that a bargaining order is shown to be justified.

Based upon the ruling pertaining to challenged ballots it is now possible that the Union may receive a majority of the votes. Regardless of this outcome, however, it is necessary and appropriate to grant a bargaining order inasmuch as appellate procedures could result in delays or another conclusion and

because, as noted, given the gravity of Respondent's misconduct, the Union's card majority provides the more reliable test.

Otherwise, I also conclude that it is shown that objectionable conduct by Respondent occurred between the filing of the representation petition and the date of the election and the Board had found that violations of Section 8(a)(1) that occurred during such period are sufficient to warrant overturning an election. See *McLean Roofing Co.*, 276 NLRB 830 (1985) enfd. (8th Cir. 1986), and cases cited therein.

IV. Conclusion of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for collective-bargaining is:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By interrogating employees concerning their Union sympathies; by confiscating Union literature; by threatening employees that benefits would be withheld and with the

imposition of more onerous working conditions; by telling employees they were being transferred to the payroll of a temporary employment service to discourage support for the Union, and by telling employees the payroll transfer was done to "scare" them off the Union, Respondent has interfered with, restrained and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By laying off all 21 day shift, plating department bargaining unit employees on July 19 and by discriminatorily delaying the recall of employees suspected of having Union sympathies, because of employee Union activities (including specifically, the delivery of a petition pertaining to wages and benefits to the company president), in pursuing Union affiliation for purposes of collective-bargaining representation, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By suspending and terminating employees Keith Mills, Michael Proffitt and Lisa Nixon because of or in retaliation for the employees' Union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By first delaying expected wage raises on review and vacations, then timing an increase in these same benefits shortly after it made a discriminatory mass layoff of 21 employees and suspended the leading Union spokesmen, all during the course of a Union campaign, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (5) of the Act.

8. By promulgating an employee handbook with unilateral changes in terms and conditions of employment subsequent to the Union's card majority demand for recognition without notice to

or bargaining with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

9. From April 18, 1991, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining and at all times since, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the Unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

10. By failing and refusing to recognize and bargain with the Union on and since April 18, 1991, while engaging in unfair labor practices which undermined the Union's majority status and which would impede the election process, the Respondent violated Sections 8(a)(1) and (5) of the Act.

11. The challenged ballots of employees Robert Husslein, Paul Plonka, Stephen Iggens, Jason Rothwell, and Raymond Tippet from the election June 21, 1991, should be counted, resulting in the issuance of a certification of results in Case No. 30-RC-5250.

12. The unfair labor practices found above were independently, substantially, and pervasively disruptive of the election process, preclude a fair election, and warrant an Order to bargain.

13. Staff Right Inc., is not a joint employer for purposes of "Remedy" herein.

14. Except as found herein, Respondent is not shown to have engaged in any other unfair labor practices as alleged in the complaint.

Appendix D

V. Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I found that Respondent violated the Act by laying off 21 bargaining unit employees and thereafter specifically illegally terminating employees Lisa Nixon, Keith Mills and Michael Proffitt, I find it necessary to order that Respondent be required to reinstate these employees not already reinstated in order to restore the status quo ante existing prior to its commission of this unfair practice and to make all of them whole for the time on layoff on and after July 19, 1991.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate the three named terminated employees to their former jobs or a substantially equivalent positions and to recall any employee laid off on July 19, 1991 and not previously recalled and reinstated, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practices against them by payment to them a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F.W. Woolworth Company,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded, Inc.,* 283 NLRB 1173 (1987),[10] and that Respondent

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10. Under *New Horizons,* interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

expunge from its files any reference to their layoff or termination and notify them in writing that this has been done and that evidence of the unlawful termination will be used as a basis for future personnel action against them.

Because a failure to grant a bargaining order as requested by the Charging Party, General Counsel would reward Respondent for its wrongdoing, *Impact Industries,* 285 NLRB 5 (1987) and as the Respondent has engaged in misconduct that otherwise demonstrates the need for a *Gissel* order, I recommend that the Respondent be required to recognize and bargain with the Union and, if agreement is reached, to reduce the agreement to a written contract.

Otherwise, it is not considered to be necessary that a broad Order be issued.

Upon the foregoing findings of fact and conclusions of Law, upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

ORDER

Respondent, America's Best Quality Coatings Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Terminating or laying off any employees or

11. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purpose.

otherwise discriminating against them in retaliation for engaging in Union activities or other protected concerted activities.

(b) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, by interrogating employees concerning their Union sympathies, confiscating Union literature, threatening employees that benefits would be withheld and that it would impose more onerous working conditions and by telling employees they were transferred to the payroll of a temporary employment service to scare them off the Union.

(c) Delaying expected wage increases or reviews and vacations or giving such benefits in a manner that interferes with employee Section 7 Rights.

(d) Promulgating rules or an employee handbook with unilateral changes in terms and conditions of employment subsequent to the Union's card majority demand for recognition without notice to or bargaining with the Union.

(e) Failing and refusing to recognize and bargain with the Union, while engaging in unfair labor practice after the Union has established majority status.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Keith Mills, Michael Proffitt, Lisa Nixon and

all bargaining unit members of the day shift plating department employees laid off or terminated on or after July 19, 1991, immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them, including wages increases and vacation benefits that they may have been illegally delayed or not provided, in the manner specified in the section above entitled "The Remedy" and expunge from its files any reference to their termination and notify them in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel actions against them.

(b) Recognize and on request, bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

(c) On request of the Union, rescind any departures from terms and conditions of employment that were unilaterally made by the Respondent on or after April 18, 1991, retroactively restoring preexisting terms and conditions of employment, excluding any retroactive reduction in wage rates.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this Decision.

(f) Post at its Milwaukee, Wisconsin, facility and mail to all employees who were laid off on July 19 and or subsequently terminated, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 30 in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case No. 30-RC-5250 be remained to the Regional Director for Region 30 for such further action as is necessary based upon the findings and conclusions herein.

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12. In this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix D

Dated, Washington, D.C. March 1, 1993

s/ Richard H. Beddow, Jr.
Richard H. Beddow, Jr.
Administrative Law Judge

APPENDIX E — ORDER BEFORE THE NATIONAL LABOR RELATIONS BOARD DATED FEBRUARY 7, 1992

Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 30-RC-5250

AMERICA'S BEST QUALITY COATINGS: STAFF RIGHT, INC. Joint Employers

Employer

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Petitioner

ORDER

Pursuant to a Stipulated Election Agreement executed by the parties, and approved by the Acting Regional Director for Region 30 of the National Labor Relations Board on May 17, 1991, an election by secret ballot was conducted in the above-entitled proceeding on June 21, 1991, under the direction and supervision of the Regional Director. Upon the conclusion of the election, a tally of ballots was prepared and made immediately available to the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that there were approximately 72 eligible voters and that 68 ballots were cast, of which 30 were for the Petitioner, 29 were against the Petitioner, and 9 were challenged.

Appendix E

The challenged ballots are sufficient in number to affect the results of the election and, on June 28, 1991, the Employer and the Union filed timely objections to conduct affecting the results of the election. The Regional Director investigated the issues raised by the Employer's objections and, on January 17, 1992, issued served on the parties his Report and Recommendation on Employer Objections to Conduct Affecting the Results of the Election.[1] In his report, the Regional Director recommended to the Board that the Employer's objections be overruled.

No exceptions to the Regional Director's report were filed by either party within the time provided. The Board adopts the Regional Director's recommendations as contained in his report. Accordingly,

IT IS ORDERED that the Employer's objections are overruled.

IT IS FURTHER ORDERED that the above-entitled proceeding is remanded to the Regional Director for Region 30 for further processing consistent with his report.

Dated, Washington, D.C., February 7, 1992.

By direction of the Board:

John J. Toner
Associate Executive Secretary

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1. On January 17, 1992, the Regional Director issued a separate Order Consolidating Cases and Notice of Hearing on Challenged Ballots and Union Objections to Conduct Affecting the Results of the Election.

(2)

No. 94-1613

Supreme Court, U.S.
FILED
JUN 1 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1995

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) acted within its remedial discretion in ordering petitioner to bargain with the union.

2. Whether the delay in counting election ballots caused by the Board's decision to consolidate the hearing on ballot challenges with the hearing on unfair labor practice charges violated the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 44 F.3d 516. The opinions of the National Labor Relations Board (Pet. App. 20a-36a) and the administrative law judge (Pet. App. 37a-99a) are reported at 313 N.L.R.B. 470.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1995. The petition for a writ of certiorari

was filed on April 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since June 1990, petitioner has operated a metal plating plant in Milwaukee, Wisconsin. Pet. App. 2a. Petitioner hired an employment agency, Staff Right, Inc., to supply it with employees. *Id.* at 3a. During its first several months of operation, petitioner promised its employees pay raises and additional vacation time, effective after one year of employment. *Id.* at 2a-3a. In March 1991, petitioner's employees became concerned about the status of the promised raises and vacation time. *Id.* at 3a. As a result, several employees contacted the United Electrical, Radio and Machine Workers of America (Union) and began circulating an organizing petition. *Id.* at 2a-3a. Thirty-three employees signed the petition. *Id.* at 3a.

By April 18, 1991, a majority of petitioner's employees had signed authorization cards designating the Union as their bargaining representative. Pet. App. 3a. That same day, a group of employees and Union representatives asked petitioner to recognize the Union voluntarily, but petitioner refused to do so. *Ibid.* The Union then filed a representation petition with the National Labor Relations Board (Board). *Ibid.* An election was scheduled for June 21, 1991. *Id.* at 43a.

The day after the Union filed the representation petition, petitioner's president, Robert Peterson, announced that petitioner was transferring all employees to the payroll of Staff Right for an indefinite period. Pet. App. 3a. Peterson's announcement frightened the employees because it led them to believe that they were only temporary employees. *Ibid.*

Shortly after Peterson's announcement, supervisor Keith Stanosz told several employees that petitioner "was trying to scare [the employees] off of the Union" by transferring them to Staff Right's payroll. *Id.* at 67a.

Petitioner also engaged in other tactics that were designed to thwart unionization efforts. Pet. App. 4a. For example, just before the cut-off date for eligibility to vote in the representation election, petitioner hired eight new employees it believed were likely to vote against the Union. *Id.* at 4a, 78a-79a. In addition, in the days leading up to the election, petitioner's officials questioned employees about their union views and threatened to enforce stricter working conditions if the employees voted for the Union. *Id.* at 4a. President Peterson personally questioned one employee about his union views. *Id.* at 22a-23a. Peterson also required an employee to remove a pro-union leaflet, while not requiring the removal of an anti-union sign. *Id.* at 4a. Four days before the election, Peterson informed employees that petitioner could not provide any raises or change vacation schedules because the election was pending. *Ibid.* Peterson told employees they would receive their raises and paid vacations "down the road." *Id.* at 75a. At the June 21, 1991 election, the employees voted 30 to 29 in favor of the Union, with nine challenged ballots. *Id.* at 4a.

On July 18, 1991, a group of employees, led by employees Proffitt, Mills, and Nixon, presented Peterson with a petition demanding the raises and paid vacation time previously promised. Pet. App. 4a. Later that day, someone caused an unauthorized drainage of acid from storage tanks in the plant. *Id.* at 5a. The next day, Peterson laid off all first-shift employees in the plating department. *Ibid.* Peterson in-

formed the employees that they had engaged in "misconduct" by demanding their promised benefits and causing the drainage of acid. *Id.* at 56a. On July 22, employees began picketing at the plant to protest the mass layoff. *Id.* at 5a.

On July 27, 1991, petitioner began to reinstate employees. Pet. App. 5a. Petitioner recalled less senior employees ahead of members of the union organizing committee. *Ibid.* Petitioner then notified employees that it had decided to grant eligible employees merit wage reviews and vacation time. *Ibid.*

In September 1991, petitioner issued a handbook to the employees, which reflected numerous unilateral changes in their terms and conditions of employment. Pet. App. 6a. Thereafter, petitioner discharged Proffitt, Mills, and Nixon. *Id.* at 5a-6a. Petitioner claimed that Proffitt and Mills were involved in the acid-drainage incident and that Nixon had failed a required drug test. *Ibid.*

2. On May 1, 1992, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. 38a. After a hearing, an administrative law judge (ALJ) found petitioner guilty of numerous unfair labor practices. *Id.* at 91a-95a. First, the ALJ found that petitioner violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), by transferring employees to Staff Right's payroll in order to discourage union support, interrogating employees concerning their union sympathies, and threatening employees with loss of benefits and more onerous working conditions. Pet. App. 91a-92a. Second, the ALJ found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off first-shift employees in retaliation for their union activity, delaying the recall

of pro-union employees, and discharging Mills, Proffitt, and Nixon, because of their union activity. Pet. App. 92a. Third, the ALJ found that petitioner violated Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. 158(a)(1), (3), and (5), by failing to implement promised wage increases and vacation time prior to the election, and then suddenly granting those benefits afterwards. *Ibid.* Finally, the ALJ found that petitioner violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing the terms and conditions of employment. Pet. App. 92a-93a.

Applying this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the ALJ recommended that the Board order petitioner to bargain with the Union. Pet. App. 89a-90a. The ALJ explained that petitioner's conduct "is so serious and substantial in effect that a fair election untainted by the undermining impact of [petitioner's] discriminatory conduct would be unlikely." *Id.* at 89a-90a.[1]

3. The Board affirmed the ALJ's unfair labor practice findings. Pet. App. 21a. The Board also adopted the ALJ's recommendation that it issue a *Gissel* bargaining order. *Id.* at 26a. Like the ALJ, the Board found that "[petitioner's] course of misconduct, both pre and postelection, clearly demonstrates that the holding of a fair election in the future would be unlikely." *Ibid.*

In reaching that conclusion, the Board emphasized that President Peterson's announcement of the transfer of employees to Staff Right's payroll was

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[1] The ALJ also determined that five of the nine challenged ballots should be opened and counted, and that petitioner's conduct justified setting aside the election. Pet. App. 48a-55a, 91a; see note 2, *infra*.

intended "to impress upon employees that [petitioner] controlled their employment to the exclusion of any outside organization that might attempt to improve their working conditions." Pet. App. 27a-28a. The Board also took into account the fact that petitioner's officials had interrogated and threatened employees in the critical preelection period. *Id.* at 27a. The Board also deemed it significant that petitioner first denied employees expected wage reviews and paid vacations before the election, and then granted such benefits afterwards. *Id.* at 28a. The Board noted that such "fist inside the velvet glove" tactics "are particularly lasting in their effect on employees." *Ibid.* Finally, the Board stressed that the "discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." *Ibid.* That conduct "directly affected approximately one-third of the bargaining unit," the Board explained, and its likely result was "to reinforce the employees' fear that they would lose employment if they persisted in union activity." *Ibid.*

The Board rejected petitioner's contention that a bargaining order was inappropriate because of employee turnover. Pet. App. 29a. The Board stated that "employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order." *Ibid.* "[E]ven assuming that employee turnover would be a relevant factor in an appropriate case," the Board concluded, "this is not such a case," because "there is a 'clear causal connection' between the turnover in the unit and [petitioner's] illegal conduct of laying off the day shift

plating department and delaying the recall of employees most likely to have been union supporters." *Ibid.* Finally, the Board rejected petitioner's assertion that a bargaining order was inappropriate under *Impact Industries, Inc.* v. *NLRB*, 847 F.2d 379 (7th Cir. 1988), where the court remanded a *Gissel* bargaining order that was issued by the Board more than seven years after the election. Pet. App. 29a n.8. Here, the Board noted, there was no comparable delay in issuing the bargaining order. *Ibid.*[2]

5. The court of appeals enforced the Board's order. Pet. App. 1a-17a. The court pointed out that "[petitioner] does not appeal the unfair labor practice findings, but rather only challenges the Board's bargaining order as an improper remedy." *Id.* at 7a. After noting that the Board has "broad discretion" to devise appropriate remedies, *id.* at 8a, the court concluded that the Board had not abused that discretion here. *Id.* at 12a. The court stated that "[g]iven both the ALJ's and Board's findings, we will not disturb the conclusion that [petitioner's] actions rise to the level of misconduct that merits the imposition of a bargaining order as part of the remedy." *Ibid.*

The court rejected petitioner's contention that the passage of time and employee turnover made the bargaining order inappropriate. Pet. App. 13a. The court explained that "there were no extreme gaps in

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[2] The Board instructed the Regional Director to open and count the five ballots as to which challenges had been overruled, to certify the Union if the revised tally of ballots reflected a Union victory, but to set aside the election if it did not. Pet. App. 32a-33a. Because the revised tally showed that the Union lost the election 34-30, the Regional Director set aside the election. *Id.* at 19a.

time which would render the Board's order stale." *Ibid.* The court noted that the election occurred in June 1991, the ALJ issued his opinion in March 1993, and the Board issued its decision in November 1993. *Ibid.* "While we recognize the concerns over stale orders and changed circumstances," the court stated, "we also acknowledge the ordinary institutional time lapses inherent in the legal process." *Id.* at 14a.

ARGUMENT

The court of appeals correctly rejected petitioner's contention that the Board abused its discretion in ordering petitioner to bargain with the Union. The court's conclusion does not conflict with the decision of any other court of appeals. Review by this Court therefore is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969), this Court held that the Board has authority to order an employer to bargain with a union when a majority of employees has signed union authorization cards, and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight." *Id.* at 614. The Court rejected the view that such an order conflicts with the principle of majority rule. The Court explained that authorization cards can accurately reflect employee sentiment (*id.* at 603), and that employees who wish to disavow the union can do so by filing a representation petition. *Id.* at 613. The Court also emphasized that the Board's issuance of a bargaining order is "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity" and "its choice of

remedy must therefore be given special respect by reviewing courts." *Id.* at 612 n.32.

a. Petitioner contends (Pet. 13-15) that the Board abused its discretion in issuing a bargaining order because petitioner's conduct was not sufficiently serious to prevent the holding of a fair rerun election. That fact-bound contention is without merit.

In concluding that a bargaining order was appropriate, the Board first focused on the fact that the day after the Union demanded recognition, President Peterson announced the transfer of employees to Staff Right's payroll. Pet. App. 26a-27a. The Board found that Peterson timed that announcement in order to frighten petitioner's employees and to "impress upon [them] that [petitioner] controlled their employment to the exclusion of any outside organization." *Id.* at 27a-28a. The Board also took into account the fact that, in the critical preelection period, petitioner's officials interrogated and threatened employees. *Id.* at 26a-27a. The Board also deemed it significant that petitioner had first denied the employees expected wage reviews and paid vacations before the election and then suddenly granted such benefits afterwards. *Id.* at 28a. The Board explained that such tactics "are particularly lasting in their effect on employees." *Ibid.* Finally, the Board stressed that the "discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." *Ibid.* Based on those findings, the Board reasonably concluded that "[petitioner's] course of misconduct, both pre and post-election, clearly demonstrates that the holding of a

fair election in the future would be unlikely." *Id.* at 26a.

Petitioner contends (Pet. 13) that its misconduct was "no worse" than that of employers in cases where courts have deemed a rerun election, rather than a bargaining order, to be the appropriate remedy. Petitioner's misconduct, however, was much more egregious than that of the employer in *J.J. Newberry Co.* v. *NLRB*, 645 F.2d 148, 151 (2d Cir. 1981), where the court found that the employer's violations were limited to three instances of employee interrogation and the granting of a wage increase. Nor can petitioner's misconduct be equated with that of the employer in *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981). There, the court found that the employer's conduct involved interrogation with no threat of reprisal, changes in working conditions the employer mistakenly believed were lawful, and one-day suspensions. *Id.* at 59. The other cases cited by petitioner (Pet. 13-14) are inapposite. In those cases, the courts declined to enforce the Board's bargaining order for reasons other than the lack of severity of the employer's misconduct. See *NLRB* v. *Knogo Corp.*, 727 F.2d 55, 60-61 (2d Cir. 1984) (denying enforcement because of passage of time and employee turnover); *NLRB* v. *Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841 (4th Cir. 1982) (denying enforcement due to lack of findings by Board as to necessity for bargaining order); *NLRB* v. *Vemco, Inc.*, 989 F.2d 1468, 1488 (6th Cir. 1993) (denying enforcement because union had not achieved majority status in the unit); *Conair Corp.* v.

NLRB, 721 F.2d 1355 (D.C. Cir. 1983) (same), cert. denied, 467 U.S. 1241 (1984).[3]

b. Petitioner's principal contention (Pet. 17-21) is that the Board erred in failing to consider whether employee turnover and the passage of time made it inappropriate to issue a bargaining order. In fact, however, the Board examined both factors and reasonably determined that they did not militate against the issuance of a bargaining order.

The Board specifically found "'a clear causal connection' between the turnover in the unit and [petitioner's] illegal conduct." Pet. App. 29a. The Board acted within its remedial discretion in refusing to give weight to employee turnover in these circumstances. As the Board concluded (*ibid.*), an employer should not be permitted to profit from its own wrongdoing. See *NLRB* v. *Gordon*, 792 F.2d 29, 34 (2d Cir.), cert. denied, 479 U.S. 931 (1986) (employee turnover caused by employer misconduct does not militate against a bargaining order); *NLRB* v. *So-Lo Foods, Inc.*, 985 F.2d 123, 128-129 (4th Cir. 1992) (same); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 404 (5th Cir. 1991) (delay caused by employer does not militate against a bargaining order). While petitioner asserts (Pet. 21)

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[3] Petitioner questions (Pet. 11) the Board's reliance on its post-election misconduct. An employer's post-election retaliation against employees for engaging in protected organizing activity, however, "is surely a serious unfair labor practice tending to prejudice a fair rerun" election. *NLRB* v. *Drives, Inc.*, 440 F.2d 345, 367 (7th Cir.), cert. denied, 404 U.S. 912 (1971). Accordingly, such post-election violations are "always relevant" in determining whether a bargaining order should issue. *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980); accord *Hedstrom Co.* v. *NLRB*, 629 F.2d 305, 311 (3d Cir. 1980), cert. denied, 450 U.S. 996 (1981).

that the employee turnover in this case "resulted [from] natural turnover of employees who left regardless of the alleged unfair labor practices," the Board's contrary factual finding, which was undisturbed by the court of appeals, raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

The Board found that passage of time did not militate against a bargaining order because there was no delay of unusual duration. Pet. App. 29a n.8. The Board did not abuse its discretion in reaching that conclusion. The election occurred in June 1991, the ALJ issued his opinion in March 1993, and the Board issued its decision in November 1993. *Id.* at 13a. Thus, as the court of appeals explained, the time sequence in this case amounted to "ordinary institutional time lapses inherent in the legal process." *Id.* at 14a. There were not any "extreme gaps of time which would render the Board's order stale." *Id.* at 13a-14a.

Petitioner contends (Pet. 19-20) that the Board's view on the relevance of turnover and delay conflicts with that of many courts of appeals. In the circumstances presented by this case, however, there is no such conflict. The cases cited by petitioner (*ibid.*) hold that natural turnover is a factor that can militate against a bargaining order. None of those cases suggests that the Board must consider turnover as a mitigating factor where, as here, it is directly caused by the employer's misconduct. Similarly, while the cases relied upon by petitioner hold that inordinate delay can be a factor militating against a bargaining order (*ibid.*), no case suggests that ordinary insti-

tutional time lapses, such as those at issue here, preclude a bargaining order.[4]

2. Petitioner contends (Pet. 25-29) that the Board's delay in resolving this case violated the Due Process Clause. Petitioner failed to raise that objection before the Board, however, and therefore is jurisdictionally barred from asserting it in this Court. See Section 10(e) of the Act, 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, petitioner's contention is without merit. Petitioner argues (Pet. 26) that the Board acted unreasonably in consolidating the election ballot challenges with the hearing on the unfair labor practice charges. Because the validity of the election depended on resolving both issues, however, it was entirely reasonable for the Board to consolidate them. Such an exercise of discretion in conducting administrative proceedings does not remotely approach a due process violation.

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[4] As petitioner notes, unlike other courts that have discussed the issue, the Ninth Circuit has indicated that it will not require the Board to consider passage of time and employee turnover in deciding whether to issue a *Gissel* bargaining order. *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427 (1991). This is not an appropriate case, however, to resolve that conflict. Because the Board considered employee turnover and passage of time and reasonably determined that they should not preclude a bargaining order on the facts of this case, petitioner's challenge to the Board's bargaining order would fail in every circuit. In addition, while petitioner contends (Pet. 21-25) that there is inconsistency among decisions *within* several courts of appeals on the relevance of turnover and delay, intra-circuit discrepancies do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

No. 94-1613

Supreme Court, U.S.
FILED
JUN 2 - 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Where an Employer's combined pre- and post-election unfair labor practices constitute a pattern of egregious misconduct which clearly demonstrates that the holding of a fair election, in the future, would be unlikely, what, if any, mitigating circumstances would require the National Labor Relations Board to remedy any pre-election misconduct with a rerun election, notwithstanding the pattern of egregious misconduct which would support a *Gissel* bargaining order.

2. Whether, an employer can rely on "the ordinary institutional time lapses inherent in the legal process " as a basis for denying enforcement of a remedial order of the National Labor Relations Board which includes a *Gissel* bargaining order.

PARTIES BELOW

The names of all parties to this proceeding in the Seventh Circuit Court of Appeals appear in the caption of this case.

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No. 94-1613

In The

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AMERICA'S BEST QUALITY COATINGS CORPORATION (ABQC),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

The Respondent United Electrical, Radio and Machine Workers of America (UE), files this brief in opposition to the Petitioner ABQC Corporation's Petition for Writ of Certiorari in which its seeks review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, decided on January 4, 1995, in Case Nos. 93-4039, 94-1173 and 94-1198, and respectfully prays that Petitioner ABQC Corporation's petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit in the above-referenced matter be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *America's Best Quality Coatings Corporation (ABQC) v. N.L.R.B.*, 44 F.3d 516 (C.A. 7, 1995) (P.App. 1a)[1]

The decision and order of the National Labor Relations Board ("the Board" herein) is reported as *America's Best Quality Coatings Corp. and Staff Right, Inc., Joint Employers*, 313 NLRB No. 52 (1993). (P. App. 20a)

STATEMENT OF JURISDICTION

This case is before the Court on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1) which allows for discretionary review of cases in the court of appeals by writ of certiorari granted.

The company petitioned the Court of Appeals for the Seventh Circuit for review of the Board's order on December 23, 1993 pursuant to 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f). The Board filed a cross-application for enforcement on January 28, 1994. The Union also filed a petition for review on January 26, 1994, and the Company was permitted to intervene therein. On January 4, 1995, the Court of Appeals issued an order enforcing the Board's order.

The Board had jurisdiction over the unfair labor practices below under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 151, 160(a). The Board's Decision and Order issued on November 26, 1993, and is a final order with respect to all parties under Section 10(e) and 10(f) of the Act, 29 U.S.C. 160(e) and (f)). The Seventh Circuit Court of Appeals had jurisdiction over its proceeding under Section 10(e) and 10(f) of the Act, 29 U.S.C. 160 (e) and (f), the unfair labor practices having occurred in Milwaukee, Wisconsin.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. Sec. 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. Sec. 158. Unfair labor practices

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C.A. Sec. 160, Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * * *

STATEMENT OF THE CASE

Before the Seventh Circuit Court of Appeals, the Petitioner ABQC did not appeal the Board's unfair labor practice findings, but only challenged propriety of the Board's issuance of a bargaining order. (P. App. 7a) The Petitioner ABQC , "despite the findings and conclusions of the ALJ and the Board, contend[ed] that neither its pre-election conduct, nor its post-election conduct, nor a combination of the two prevented a fair election at the time or prevents fair elections in the future." (P. App. 7a)

ABQC is a closely held metal plating corporation located in Milwaukee, Wisconsin. The Company began operations in June, 1990, after purchasing the corporate entity from the then union-organized Allen Bradley Company. In early 1991, a union organizing campaign began in which the Union obtained signed union authorization cards from a majority of the workers on April 12, 1991. On April 18, the employee organizing committee demanded voluntary recognition of the Union. After the company rejected this request, a representation petition was filed. The following day, the Company transferred its employees to that of Staff Right, a temporary employment agency, and announced the transfer to scare the employees away from supporting the Union. (P. App. 8a) The

announcement did scare the employees, who then believed that they were only "temporary employees" with less job security.

Several calculated anti-union tactics by the Company were carried out extremely close to the time of election. In a break from their established hiring practices, the Company hired eight new employees just prior to the May 11 cut off date for election eligibility. Company officials interrogated employees as to their representation preferences. Threats by supervisory personnel included a promise that draconian working conditions would be imposed if the employees were to choose the Union as their bargaining representative. Peterson, the Company president[2] forced an employee to remove a pro-union leaflet, while protecting his anti-union signs.

Contrary to the Petitioner's contentions that "Whatever the level of discussion about the union and the employer's preferences, it was not likely the employees were intimidated by the employer. . . ." (P. Br. 4) The Board found that President Peterson engaged in interrogation which showed "that [ABQC], at the highest level of management, was willing to . . . cross the line between casual and coercive conversation in order to attempt to influence the outcome of the forthcoming election." (P. App. 23a)

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[2] The Petitioner cites P. App. 41 erroneously contending that record evidence states: "During the same period, the company has had three different presidents (P. App. 41a); neither the person in charge today nor his predecessor were present during any of the conduct in issue." (P. Br. 6) This alleged evidence is not in the record, but rather P.App. 41a is background information about Eugene Plonka, a former president of ABQC, prior to the Union organizing campaign.

This is not consistent with the Petitioner's position before the court of appeals because ABQC was not "claiming that changes in management occurred. . . ." (P. App. 29a)

Also at P. Br. 6, the Petitioner ABQC refers to "much natural employee turnover that the majority of those working at ABQC today never voted in the election." Again said evidence not in the record

On June 17, just four days prior to the election, Peterson informed employees in a mandatory meeting that due to the pending election he would not give any raises or change any vacation schedules, despite the elimination of a "cash flow" problem. The election was held with 30 ballots for Union representation, 29 ballots against, and 9 determinative challenged ballots.[3]

Less than one month after the election with the objections and challenges to the election still pending, the Company gave warnings to three key organizing employees, Michael Proffitt, Keith Mills, and Hicks, for "poor attendance." Two days later, the three employees attempted to grieve the warning. Peterson would not accept the grievance because he did not recognize the Union. On the very next day 30 employees approached Peterson and asked for their promised wage increases and vacation time which had accrued. Peterson refused all of the requests.

On the same day as the Peterson-employee exchange, July 18, several storage tanks malfunctioned causing problems to several areas. Since several machines were no longer operating due to this mishap, first shift employees were released for the day by Peterson. On the very next day, when the employees of the first shift arrived for work, the employees were told that they were laid off indefinitely. On July 22, the laid off employees began to picket the plant. Five days later the Company reinstated some of the first shift employees, and began to grant eligible employees their earned vacation time and entertain merit wage reviews.

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[3] In its Decision and Order, the Board overruled 5 of the 9 challenged ballots resulting in a 34 to 30 vote against the Union.

Contrary to the Petitioner's contentions, the recalls of first shift employees were not based on seniority, experience, or machine qualifications. Rather, the call-backs reflected the degree of individual employee Union involvement, with the most stringent Union supporters left in the cold. None of the union organizing committee members were called back until late October. [4] (P. App. 5a)

Perhaps the most glaring inaccuracy in Petitioner's statement of facts is the assertion that "No one was fired, no one was demoted, and no one was denied a day's pay, but the sort of conduct which did occur has been the basis for ordering rerun elections in other cases." The Petitioner ABQC's own illegal conduct resulted in the overturning of the first election, but before another election could be held, the Petitioner ABQC engaged in egregious unfair labor practices, none of which was challenged by the Petitioner in the lower court, including the layoff of 21 day shift plating department employees. "On July 18 there had been 23 day shift plating department employees including three lead persons. As of August 26 only 9 of the 20 had been recalled." Clearly they were denied more than "a day's pay."

Additionally, Peterson and company attorneys repeatedly interrogated laid off employees and union activists Mills and Proffitt as to their involvement in the July drainage malfunction. Despite their continual denials of any negligence on their part, the Company dismissed Mills and Proffitt on February 24, 1992, while the Company refused to investigate other leads. (P. App. 5a, 61a)

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[4] Although the Petitioner did not appeal the Board's findings of facts and unfair labor practice violations below, contrary to the record, the Petitioner now asserts "Employees were recalled on the basis of need and skill, (Tr. 1416-1417) but the Board has deemed the sequence of those recalls discriminatory . . . . " (P.Br. 6)

The record evidence established that in late October 1991, the Company recalled Lisa Nixon. The company required Lisa Nixon to take a drug test upon recall. One week after the test. the company terminated her stating that her test for drug use was positive. Despite Lisa Nixon's denial of any drug use and her insistence on receiving a copy of the test results, the Company refused her request and refused to reconsider its termination. (P. App. 6a)[5] Although the Petitioner did not appeal these conclusions, it erroneously contends that "the bona fides of a drug testing program . . . disqualified one of the employees from returning." (P. Br. 6 citing P. App. 28a which states:

> "The discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten." (P. App. 28a)

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[5] "No explanation was given as to why the test report was not given to Nixon or why it was not in her file. * * *

"Here, the physical test report is inconsistent with the date of the actual 'collection' and cast into doubt the validity of Petersen's phone receipt of the test results on or about November 7 and, lend credence to Nixon's consistent denial of drug involvement. Respondent's entries on her personnel records also are inconsistent and, in the light of the overall strong showing of motivation against Nixon and others because of union activities, support an inference that Respondent has relied upon pretextual reasons in its apparent desire to avoid recalling a strong Union supporter. Moreover, I find that Respondent's assertion that Nixon was denied recall under its drug policy also is pretextual." (P. App. 64a)

In early September, 1991, the Company also unilaterally issued its first employee handbook drastically changing the terms and conditions of employment. Changes in wage structure, work hours, and polices of sexual harassment, drugs and alcohol use, report pay, call-in pay, outside employment, solicitation, progressive discipline, paid time-off, holidays and seniority were all effectuated. In late March 1992, ABQC unilaterally created formal job classifications which imputed pay structures and wage ranges. A further wage rate modification was enacted in June 1992.

The Board found that the election was plagued with unlawful activity by the Company's violations of §8(a)(1), (3), and (5) of the Act by coercively interrogating and threatening employees and by telling employees that they had been transferred to the payroll of Staff Right in order to scare them from supporting the Union. The Board found that the Company also violated §8(a)(1) and (3) by laying off all bargaining unit employees; by discriminatorily delaying the recall of certain employees after the layoff because of their union sympathies or activities; and, by suspending and terminating Mills, Proffitt and Nixon because of their union activities. The Board found additional §8(a)(1) and (3) violations in delaying and then granting employment benefits before, during and after the union campaign as well as making unilateral changes in terms and conditions of employment. The Board also found that the company violated §8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union after the Union demanded such action and had obtained signed authorization cards from a majority of the Company's production and maintenance employees. Further, the Board noted that the unfair labor practices intensified after the inconclusive June 21 election. (P. App. 27a)

The Company did not appeal the Board's findings of the unfair labor practices set forth above or the cease and desist orders including the "broad order" under *Hickmott Foods*, 242 NLRB 1357 (1979), but rather limits its challenge both here and in the Seventh Circuit Court of Appeals to the propriety of a *Gissel* bargaining order as a remedy.

ARGUMENT

A. Basis for Granting Petition for Writ of Certiorari

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Considerations Governing Review on Writ of Certiorari, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." While not controlling or all encompassing, subdivision (a) includes as one of the reasons that will be considered is "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . ."

B. Mitigating Circumstances

In the instant case, the Petitioner contends that "[t]his case warrants certiorari because it offers an opportunity to resolve the disputes between the decision makers about the circumstances which justify the invocation of what this Court has deemed an extraordinary remedy." (P. Br. 9)[6] The alleged dispute between the courts of appeals as set forth by Petitioner is whether the passage of time and employee turnover are relevant considerations to the validity of a bargaining order.

The Petitioner's primary focus is on "mitigating circumstances" which include alleged employee turnover and alleged management turnover; however, the record is void of any testimony and/or documentary evidence supporting counsel's argument as noted both by the court of appeals and by counsel's own footnote. (P. App. 29a, P. Br. 7, note 3)

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[6] References to the Petitioner's Brief will be cited as "P. Br. [page #]" herein.

Further, the Petitioner raised the issue of the lapse of time which would render the Board's order stale. However, the court of appeals which has refused to enforce Board orders which were stale as in *NLRB v. Thrill, Inc.*, 980 F.2d 1137 (7th Cir. 1992) (in which there was a seven year delay between the issuance of the Administrative Law Judge's decision and the Decision of the Board) held that the time between March 1993 when the ALJ issued his decision and November 1993, "was far short of the seven years in *Thrill*, and characterized the two year time period between the election and the Board's order as "ordinary institutional time lapses inherent in the legal process." (P. App. 14a)

C. Application of Gissel Insures Employees § 7 Rights and Effectuates the Policies of the Act

Contrary to the Petitioner, the Respondent Union contends that the application and analysis of *Gissel*[7] bargaining orders by the many circuits has been very consistent. Although the "hallmark violations" giving rise to the Board's bargaining orders have differed, the application of the law as forged by this Court over twenty-five years ago has remained a beacon for the courts of appeals.

The circuits cite a litany of oft repeated holdings of law in regards to *Gissel* bargaining orders. Paramount is the strong preference for elections over other possible remedies crafted by the Board. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602-603(1969); *NLRB v. Maidsville Coal Co.* 693 F.2d 1119(4th Cir. 1982), *enf'd* 718 F2d 658, *cert. denied* 465 U.S. 1079 (1984); *NLRB v. Grandee Beer Distributors, Inc.*, 630 F.2d 928, 934(2nd Cir. 1980). The presumption of an election, or a rerun election, as the most preferred remedy emanates from Section

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[7] *National Labor Relations Board v. Gissel Packing Company, Inc.*, 395 U.S. 575; 89 S.Ct. 1918; 23 L.Ed.2d 547 (1969)

7 protected rights of employees. Section 7 guarantees employees within the meaning of the Act the right to select their form of representation, if any, by a majority rules system. *29 U.S.C.* §157; *Gissel*, supra. However, an election can not always be a reliable indicator of the preference of a majority of employees, especially where, as here, the Petitioner ABQC engaged in calculated actions aimed at sabotaging the employees' Section 7 rights.

> "If the Board finds that the possibility of erasing the effects of past unfair labor practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment, once expressed through cards would, on balance, be better protected by a bargaining order,"

then a bargaining order is necessary and proper. *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 840 (4th Cir. 1982), citing *Gissel*, 395 U.S. at 614-615.

Egregious unfair labor practices committed by an employer constitute intrusions into employees' fundamental rights, termed "hallmark violations," that will generally support the issuance of a bargaining order unless some significant mitigating circumstance exists. *NLRB v. Windsor Industries,Inc.*, 730 F.2d 860, 867 (2nd Cir. 1984). Prior to the enforcement or reversal of a bargaining order, the Board, and the courts through appellate review employ a multi-faceted test in order to determine whether the issuance of a bargaining order is warranted. Majoritysupport for the union, typically through validly ob-

tained union authorization cards, at some point in time must be demonstrated.[8] This rule is very well established.[9]

After majority status has established, the effect of an employer's misconduct must be shown to have undermined the union majority strength, and most importantly, the possibility of erasing the effects of past employer unfair labor practices and of ensuring a fair election by the use of traditional remedies, though present, must be slight. *Gissel*, 395 U.S. at 614-15; *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990).

D. Board Discretion in Fashioning Remedies Must Be Flexible to Withstand Changing Nature of Violations

Two different levels of employer misconduct have predicated the issuance of bargaining orders. Unfair labor practices which have been characterized as being "pervasive" and "outrageous" have met the requisite level of misconduct for a bargaining order. *Clothing and Textile Workers v. NLRB, opinion withheld sub nom* 673 F.2d 551, (D.C. Cir. 1982) *affirming Gordonsville Indus., Inc.* 252 NLRB 563 (1980) , *cert.*

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[8] In *NLRB v. Kawasaki Motors Corp., USA*, 257 NLRB 502, *enf'd, opinion withheld* 691 F2d 507, *cert. denied* 450 U.S. 1202 (1983), an employer unlawfully fired a union activist, threatened plant closure if union were elected, and promised benefits if union were defeated. However, the bargaining order was overturned despite the egregious conduct of the employer due to a lack of proper majority card showing. Similarly, where union misrepresentation was the principle method of obtaining authorization cards, the majority status of the union has not been recognized. *Massey Stores, Inc. v. NLRB*, 631 F2d 328 (4th Cir. 1980).

[9] In *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3rd Cir. 1980), is a rare exception where a bargaining order was issued by the Board despite the fact that no card majority was demonstrated.

denied 457 U.S. 117 (1983). *NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981). Less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process have also been remedied by bargaining orders. *J.L.M. Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). The court of appeals concluded that "The Board properly determined that the events surrounding the election fell into what we have previously termed the 'classic' bargaining case . . . the *Gissel*-type circumstance where the employer has thwarted its employees' efforts at organizing union representation." (P. App. 12a) citing *Ron Tirapelli Ford*, 987 F.2d 433, 441 (7th Cir. 1993).

E. Balancing Employee Turnover and Lapse of Time Against Employer Misconduct In Fashioning Remedies.

Mitigating circumstances such as employee turnover and lapse of time have been balanced against the primary interest of providing employees with a fair and uncoerced method of choosing their own representatives. In *NLRB v. Koenig Iron Works, Inc.*, 681 F.2d 130 (2nd Cir. 1982) lapse of time, substantial employee turnover, loss of union membership, and lack of support for strike was balanced against the possibility of deterring future misconduct and of preventing wrongs. This method of analysis is typical in remedial bargaining order cases where mitigating circumstances are present. *Chromalloy Mining and Minerals, Alaska Div. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980). While Petitioner ABQC argues mitigating circumstances, the facts do not support the argument. There is no evidence of turnover; however, if there were, the Petitioner could not benefits from its illegal conduct which resulted in the termination of the principle union activitist and the layoff of the entire first shift plating department.

As in the instant case, any possible mitigating circumstances, which were not demonstrated at the lower court, have often failed to overcome the severity of the employer's misconduct which gave rise to the issuance of a bargaining order. See *NLRB v. Wilhow Corp.*, 666 F.2d 1299 (only one of twelve employees who had signed cards remained in workforce). Similar to the instant case, where nearly half of the current

employees were employed while employer engaged in unfair practices, the employer's conduct remained unremedied and the employer never gave assurances that the conduct would not recur, the employee turnover did not warrant a denial of the bargaining order. *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257 (3rd Cir. 1982)

In the instant case, there is no evidence of turnover in management and owners; no record evidence of turnover in employees; and, the time between the issuance of the ALJ decision on March 1, 1993 until the issuance of the Board decision on November 26, 1993, is routine, administrative delay inherent in the legal process.

The Petitioner stretches the facts to mirror cases where a nearly complete turnover in rank and file employees, management, and owners occurred, no charges of unfair labor practices against the new owner had been presented, and six and one-half years had passed since predecessor's misconduct, a bargaining order has been overturned. *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978). *See also NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979)(Each member of three employee bargaining unit voluntarily resigned before charges were heard) Accordingly, said cases are just not applicable to the facts as supported by the record evidence herein.

F. The Seventh Circuit's Examination of Possible Mitigating Circumstances

In the instant case, the Seventh Circuit did analyze subsequent events including time lapse and turnover. However, the court did not find any instance of extreme time gap. As stated in the opinion, "there were no extreme gaps of time which would render the Board's order stale. The election occurred in June, 1991. The ALJ issued his opinion in March, 1993. The Board made its decision in November, 1993. The gap between opinions here was only four months, far short of the seven years in *Thrill.*" *ABQC v. NLRB*, 44 F.3d 516 (7th Cir. 1995). The court also noted that just over two years had lapsed between election and order, which the court characterized as routine

administrative delay. These are hardly the circumstances which would provide for mitigation of the Board's order.

The court also noted that the Petitioner ABQC was not "claiming that changes in mangement occurred." (P.App. 29a) While Petitioner at footnote 3 admits that there is no record evidence concerning employee turnover.

G. Remedial Authority of the Board

Section 10 of the Act has repeatedly been interpreted by the Court "as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." See *Sure-Tan, Inc.*, 467 U.S. 883, 104 S.Ct. 2803 (1984); see *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 NLRB 258, 262-263, 90 S.Ct. 417, 419-420, 24 L.Ed.2d 405 (1969); *Fibreboard Paper Products Corp. V. NLRB*, 379U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964); *Phelps Dodge Corp. V. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941).

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Sure-Tan, Inc., supra,* at 899, citing *Phelps Dodge Corp., supra,* at 194, 61 S.Ct., at 852.
>
> See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 289, 97 L.Ed. 377 (1953) (power to fashion remedies 'is for the Board to wield, not for the courts").

At ABQC, the employees' Section 7 rights were trampled upon by the Petitoner through egregious pre- and post-election violations including coercively interrogating employees and threatening them by telling employees they had been transferred tothe payroll of a temporaryagency to scare them from supporting the union; by laying off approximately 21 first shift plating department employees; by discriminatorily

delaying the recall of employees because of their union activities; by suspending and terminating Mills, Proffitt and Nixon; by delaying and then granting employment benefits; and, by making unilateral changes. The court of appeals "recognized the Board's power, responsibility and broad discretion 'to devise remedies that effectuate the policies of the Act, subject only to limited review." *Ron Tirapelli Ford, supra at* 433.

CONCLUSION

Based on the above, including the lack of record evidence contrary to the factual misrepresentations by Petitioner, the Respondent United Electrical, Radio and Machine Workers of America (UE) respectfully requests that the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Dated at Pittsburgh, Pennsylvania this 2nd day of June, 1995.

Respectfully submitted,

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